Supreme Court, U.S.
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No. 02-

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari
to the Washington Court of Appeals, Division III

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a fact (other than a prior conviction) necessary for an upward departure from a *statutory* standard sentencing range must be proved according to the procedures mandated by *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

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PETITION FOR A WRIT OF CERTIORARI

Ralph Howard Blakely, Jr.[1] petitions for a writ of certiorari to the Washington Court of Appeals, Division III, in *State v. Blakely*, No. 19545-7-III.

OPINIONS BELOW

The opinion of the Washington Court of Appeals is reported at 111 Wn. App. 851, 47 P.3d 149 (2002), and is reprinted at App. 1a-23a. The order of the Washington Supreme Court denying discretionary review of that decision is published at 62 P.3d 889 (2003), and is reproduced at App. 42a. The trial court's sentencing orders are unpublished and are reproduced at 24a-41a.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its order denying Petitioner's petition for review on February 4, 2003 App. 42a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

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[1] Some of the captions of the opinions below incorrectly transpose Mr. Blakely's first and middle names. His true name is Ralph Howard Blakely, Jr.

Relevant statutory provisions of the Revised Code of Washington are reproduced at App. 51a-68a.

STATEMENT OF THE CASE

1. The Washington Legislature enacted the Sentencing Reform Act of 1981 (the "Sentencing Reform Act" or the "Act") to "develop[] a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences." Wash. Rev. Code § 9.94A.010. The core of this Act is a grid of "standard ranges," or "presumptive sentences," calculated according to the seriousness of the offense and the criminal history of the offender. *See* § 9.94A.310.[2] (The relevant portions of the Sentencing Reform Act are reproduced at App. 51a-64a).

The Act provides, subject to exceptions not relevant here, that when a person is convicted of a felony, courts "shall impose" a sentence within the standard range unless "it finds . . . substantial and compelling reasons justifying an exceptional sentence." §§ 9.94A.120(1)-(2). The Act then sets forth factors, such as manifesting deliberate cruelty and knowingly inflicting violence upon a pregnant victim, §§ 9.94A.390(2)(a) & (c) that may supply a substantial and compelling reason to depart upward and impose an exceptional sentence. Although these enumerated factors are "illustrative" rather than exclusive, § 9.94A.390, "[a] reason offered to justify an exceptional sentence can be considered *only if* it takes into account factors *other than those which are used in computing the standard range sentence for the offense*." *State v. Gore*, 143 Wn.2d 288, 315-16, 21 P.3d 262 (2001) (emphasis added).

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[2] The Washington Legislature has recodified and amended various provisions of the Sentencing Reform Act since the trial court proceedings in this case. *See* Rev. Code. Wash. §§ 9.94A.505-35 (2002). None of these changes alter the substantive Washington law relevant to this case in any relevant respect. For purposes of simplicity, this petition refers, as the courts below did, to the old statutory section numbers.

In other words, a court may depart upward from the standard sentencing range only by making findings beyond those required by the elements of the underlying offense. Such findings need be made only "by a preponderance of the evidence." § 9.94A.370(2); *Gore*, 143 Wn.2d at 315.

The Act also caps the extent to which Washington courts may depart upward from standard ranges. "A court may not impose a sentence providing for a term of confinement . . . which exceeds the statutory maximum for the crime as provided in [§ 9A.20.121]." § 9.94A.120(14). The "statutory maximum," as defined in § 9A.20.121, sets maximum sentences depending on whether the offense of conviction is a class A felony (life), class B felony (ten years), or class C felony (five years).

2. Petitioner Ralph Howard Blakely, Jr. "has been diagnosed at various times since 1972 as suffering from schizophrenia." App. 4a; *see also* App. 31a-32a. He and his wife, Yolanda, separated in 1995, and later that year she filed for divorce. Over the next two years, Yolanda sought to terminate the family trust and to remove Petitioner's control over certain jointly held properties. App. 24a. In 1998, according to factual findings by the trial court, Petitioner, while armed with a knife, abducted his wife from their home in Washington and drove her toward another of the family's properties in Montana. During parts of the drive Petitioner forced his wife to ride in a wooden box in the bed of his pick-up truck; at other times she rode in the passenger seat. Petitioner told her during these actions that he was doing this because wanted her to dismiss the divorce filing and the litigation over the trust. App. 25a-26a.

On July 18, 2000, Petitioner entered an *Alford* plea of guilty in the Superior Court of Washington for Grant County to one count of second degree kidnapping with a deadly weapon and to one count of second degree assault, both of which are

class B felonies. App. 1a, 35a-36a.[3] As part of the plea agreement, the State agreed to recommend a sentence in the high end of the standard range. App. 6a. The standard range for the kidnapping charge was 49 to 53 months,[4] and the standard range for the assault charge was 12 to 14 months. App. 6a. Under Washington law, such sentences presumptively run concurrently. *See* Wash. Rev. Code §9.94A.589.

Before imposing a sentence, the trial court asked Petitioner's wife to describe the circumstances underlying the crimes. The court also reviewed three psychological evaluations stating that Petitioner had abducted his wife as an "honest attempt" – misguided though it was – "to renew his family." App. 44a; *see also* App. 32a. After hearing these presentations, the court noted that "[t]here has always been, in this case, a great deal of dispute about such things as [Petitioner's] mental condition at the time that these offenses occurred [and Petitioner's] motivation for doing what he did." App. 46a.

At the close of the sentencing hearing, the court rejected the recommended sentence as "too lenient," App. 47a, and stated that it intended to depart upward 37 months from the top of the standard range and impose an exceptional sentence

[3] Mr. Blakely's guilty plea also acknowledged that his crimes involved domestic violence because his wife was the victim. App. 35a; Wash. Rev. Code § 10.99.020(3)(b) & (p) (requiring trial courts to make a finding of "domestic violence" when the victim of a kidnapping or assault was a member of the defendant's family). A "domestic violence" plea does not affect the length of offender's sentence but rather allows the court to issue certain kinds of directives such as "no contact" orders and orders requiring the offender to participate in a domestic violence perpetrator program. *See* Wash. Rev. Code §§ 9.94A.505(11) & 10.99.040; App. 39a (issuing no contact order here).

[4] Petitioner's standard range for the kidnapping charge included an enhancement for the use of a deadly weapon. Deadly weapon enhancements in Washington must be plead in the indictment and proved beyond a reasonable doubt. Petitioner's guilty plea encompassed this issue.

of 90 months. The court stated that this upward departure would be based on findings of (i) deliberate cruelty, which is a statutorily enumerated aggravating factor, § 9.94A.390(2)(a), and (ii) "domestic violence plus deliberate cruelty and commission within the sight or sound of the victim's minor child," which likewise is enumerated at § 9.94A.390(2)(h)(ii) & (iii). App. 15a; *see also* 47a-50a (judge's oral explanation). In response, Petitioner moved to withdraw his guilty plea, but the court denied that motion.

Petitioner also objected to the court's intended sentence. The court then continued the sentencing hearing and decided to hold an evidentiary hearing regarding whether to depart upward from the standard range. Before that hearing, Petitioner filed a motion requesting a standard range sentence and arguing that *Apprendi v. New Jersey,* 530 U.S. 466 (2000), prohibited the court from departing upward without submitting the factual bases for the proposed aggravators to a jury and requiring that these facts be proved beyond a reasonable doubt. App. 12a. The court rejected the *Apprendi* argument and went ahead with the evidentiary bench hearing.

Following the hearing, the trial court entered an order finding as a matter of fact that Petitioner's "motivation to commit the kidnapping was complex, contributed to by his mental condition and personality disorders, the pressures of divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children." App. 32a. The court also found that Petitioner's "capacity to appreciate the wrongfulness of his conduct . . . was impaired by his personality disorders, but not significantly so." App. 33a. Turning then to the statutory aggravating factors, the court concluded that Petitioner's "personality disorders did not significantly impair his capacity to act with deliberate cruelty." Accordingly, the court imposed the 90-month exceptional sentence, to run concurrently with a 14-month sentence for the assault charge. App. 7a, 33a-34a.

3. The Washington Court of Appeals affirmed Petitioner's conviction and sentence. Addressing the upward departure that the trial court imposed, the Court of Appeals noted that a technicality in state law may have prevented the trial court from relying on bare "deliberate cruelty" as an aggravating factor. App. 17a. But it ruled that this potential error was irrelevant because "the alternate basis of domestic violence with deliberate cruelty supports the exceptional sentence here." App. 17a n.4.

The court then rejected Petitioner's *Apprendi* argument. The Court of Appeals noted the Washington Supreme Court had held in *State v. Gore,* 143 Wn.2d 288 (2001), that "*Apprendi* does not apply to factual determinations that support reasons for exceptional sentences upward." App. 18a. The *Gore* decision, therefore, foreclosed Petitioner's contention.

4. Petitioner sought discretionary review of this decision in the Washington Supreme Court, arguing, *inter alia*, that the trial court's upward departure contravened *Apprendi*. App. 69a-70a. The Washington Supreme Court denied review without comment. App. 42a.

REASONS FOR GRANTING THE WRIT

Ten of the seventeen states that have sentencing guidelines codify standard, or presumptive, sentencing ranges. Under these systems, sentencing courts may impose sentences above the statutory standard ranges *only if* they find, by a preponderance of the evidence, aggravating facts that are not already encompassed within the elements of the underlying offense. Courts within these ten states are in conflict concerning whether such factual findings must be made according to the procedures mandated by *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

This case presents an ideal vehicle for resolving this important issue. The trial court here imposed an upward departure based on a factual determination – that defendant acted with "deliberate cruelty" in the course of committing domestic violence – that it acknowledged involved a "complex" *mens rea* issue that was the subject of "a great deal of dispute" at an evidentiary hearing. App. 32a, 46a. This Court should grant certiorari and hold that *Apprendi* requires factual issues under these circumstances to be submitted to a jury and proved beyond a reasonable doubt.

A. This Court Should Resolve the Split of Authority Over Whether a Fact (Other Than a Prior Conviction) Necessary For an Upward Departure From a *Statutory* Standard Sentencing Range Must Be Proved According to the Procedures Mandated by *Apprendi.*

1. The States' Highest Courts Are Divided Over This Issue.

Washington's "sentencing guidelines," in contrast to the federal guidelines, are a statutory enactment, known as the Sentencing Reform Act. Sections 9.94A.120(1) and (2) of that Act require courts to impose sentences within a statutory standard range unless they determine "aggravating facts" to be present "other than those which are used in computing the standard range sentence for the offense." *State v. Gore,* 143 Wn.2d 288, 315-16 (2001). A court, rather than a jury, may find such facts, and they need be found only by a preponderance of the evidence, instead of beyond a reasonable doubt. *Id.* at 315; Wash. Rev. Code § 9.94A.370(2).

The Washington Supreme Court held in *State v. Gore,* that the Sentencing Reform Act's procedures for departing upward from the statutory standard range do not contravene

this Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), because, under the Act, "the sentencing judge cannot impose *an exceptional sentence* greater than" the maximum provided in another provision of Washington law. 143 Wn.2d at 313-14 (emphasis added). In other words, the Washington Supreme Court ruled that upward departures under Washington's sentencing guidelines are not subject to *Apprendi* because even though Wash. Rev. Code §§ 9.94A.120(1) & (2) prohibit courts from imposing a sentence above the top of standard range unless they find an aggravating fact to be present, the extent to which a sentencing judge may depart upward, upon finding such a fact, also is capped.

The trial court in this case followed the procedures of the Sentencing Reform Act in sentencing Petitioner. The top of Petitioner's statutory standard range was 53 months, and the limit for an upward departure was 120 months. App. 18a; Wash Rev. Code § 9A.20.021(b). Over Petitioner's *Apprendi* objection, the court found that an aggravating fact – deliberate cruelty in the course of domestic violence – was present and imposed an exceptional sentence upward of 90 months. The Washington Court of Appeals then held that it was bound by the *Gore* decision to reject Petitioner's *Apprendi* argument because "*Gore* held that Washington's statutory scheme permits a judge to impose an exceptional sentence within the maximum range determined by the Legislature." App. 18a. "Consequently," the court continued, "the facts supporting the exceptional sentence here did not have to be submitted to a jury or proved beyond a reasonable doubt." App. 19a. The Washington Supreme Court denied review of this decision, App. 42a, presumably because it was a straightforward application of *Gore. See also State v. Urlacher,* 111 Wn. App. 1020, *review denied,* 60 P.3d 92 (Wash. Dec. 4, 2002) (same).

Three other state courts whose states have guideline sentencing systems that in all relevant respects are identical to Washington's have confronted the same *Apprendi* argument

that the *Gore* opinion and the decisions below rejected. Two of those courts reached the same conclusion as the Washington courts and upheld the sentencing procedures at issue. *See State v. Dilts,* 39 P.3d 276, 278-84 (Or. App. 2002), *review allowed,* 57 P.3d 581 (Or. 2002); *Ashby v. State,* 2002 WL 977444, at *1-3 (Minn. App. 2002); *Jackson v. State,* 2002 WL 31835460, at *5 (Minn. App. 2002), *review granted* (Feb. 18, 2003) (on post-conviction review).

The Kansas Supreme Court, however reached the opposite result in *State v. Gould,* 23 P.3d 801 (Kan. 2001), with regard to the Kansas sentencing guidelines. Kansas law, like Wash. Rev. Code §§ 9.94A.310 & 370, has a sentencing grid that sets forth "presumptive felony sentences." *Gould,* 23 P.2d at 811. Kansas law also provides, just like Wash. Rev. Code §§ 9.94A.120(1) & (2), that "[t]he sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines . . . , unless the judge finds substantial and compelling reasons to impose a departure." *Gould,* 23 P.2d at 812 (quoting Kan. Stat. Ann. § 21-4716(a)). Kansas law, just like Wash. Rev. Code § 9.94A.120.390(2), further supplies a "nonexclusive list of aggravating factors [that] may be considered in determining whether substantial and compelling reasons for [a] departure exist." *Gould,* 23 P.2d at 812 (quoting Kan. Stat. Ann. §21-4716(b)). These factors may support an upward departure only when they are not already encompassed in the elements of the offense of conviction. And Kansas law, just like Wash. Rev. Code §§ 9.94A.120(14) & 9A.20.021, has an additional statute that sets a second "statutory maximum," *i.e.,* that limits the extent to which a sentencing court may depart upward from the presumptive range. *Gould,* 23 P.3d at 806 (noting defendant's "maximum total sentence").

But unlike the Washington Supreme Court in *Gore* and the Court of Appeals in this case, the Kansas Supreme Court held in *Gould* that its law permitting judges to find aggravating

facts by a preponderance of the evidence "directly contravene[d]" *Apprendi* and, hence, was unconstitutional. 23 P.3d at 814. The defendant in *Gould* faced a statutory standard range of 31 to 34 months per count and a limit for upward departures of 68 months per count. The State argued, echoing the *Gore* decision, "that the presumed sentence was not the maximum sentence allowed by law" as *Apprendi* used that term because of the extent to which a court could depart upward also was capped. But the Court rejected this argument, explaining that:

> Under *Apprendi,* it does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than *authorized by the jury verdict. See* 530 U.S. at 469. Gould's jury verdict "authorized" a sentence of 31 to 34 months for each child abuse conviction. By imposing two 68-month sentences, the district court went beyond the maximum sentence *in the applicable grid box* and exposed Gould to punishment greater than that authorized by the jury verdict.

23 P.3d at 812-13 (emphasis added). In subsequent cases, the Kansas Supreme Court has made it clear that this same reasoning applies when, as here, the defendant pleads guilty to the underlying offense and receives an exceptional sentence upward. *See, e.g., State v. Cullen,* 60 P.3d 933, 935-37 (Kan. 2003).

These holdings of the Kansas Supreme Court are in direct conflict with the Washington Supreme Court's decision in *Gore* and the Washington Court of Appeals' application of *Gore* in this case, as well as the decisions of the Oregon and Minnesota Courts of Appeals. This conflict has existed for nearly two years now, and it cannot be resolved without this Court's intervention.

2. The Decision Below Contravenes This Court's Precedent.

A careful application of this Court's precedent dictates that upward departures from a statutory standard sentencing range, such as the Washington range at issue here, should be subject to *Apprendi*. In *Apprendi,* this Court held that any fact that subjects a defendant to a longer sentence than that "prescribed by the legislature," or the "statutory limit[]," must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 481-82; *see also id.* at 490 ("prescribed statutory maximum"). *Apprendi*, alternately stated, applies to any fact that, "if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone" (or the guilty plea alone). *Id.* at 483[5]; *accord Ring v. Arizona,* 536 U.S. 584, 588-89 (2002) (reaffirming this test).

Wash. Rev. Code §§ 9.94A.120(1) & (2) direct sentencing courts to "impose a sentence within the sentence range for the offense" unless aggravating or mitigating facts not accounted for in the elements of the offense of conviction are present. Under Washington statutory law, therefore, Petitioner's guilty plea subjected him to a sentencing range of 49-53 months – a legislatively prescribed statutory maximum of 53 months. App. 6[illegible]15a. Petitioner's sentencing court, in the words of the Washington Supreme Court, could impose a sentence outside of this statutory range

> *only* [if it found] substantial and compelling reasons, set forth in written findings and conclusions, which support an exceptional sentence. Wash Rev. Code § 9.94A.120(2), (3) . . . . A reason offered to justify an

[5] The defendant in *Apprendi,* like Petitioner here, pled guilty to the underlying offense. *See* 530 U.S. at 469-70.

> exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.

Gore, 143 Wn.2d at 315-16 (emphasis added); *see also* App. 15a (same rule).

This is exactly what Petitioner's sentencing court did. It determined that an aggravating factor – deliberate cruelty with domestic violence, App. 17 n.4 – that is not an element of Petitioner's offense of conviction was present in this case. Based on that factual finding, the court imposed, and the Court of Appeals affirmed, the imposition of a sentence 37 months longer than the maximum that could be imposed for Petitioner's guilty plea to the elements of second degree kidnapping with a deadly weapon. App. 7a, 19a.

This procedure constitutes a paradigmatic *Apprendi* violation. The court – rather than a jury – found certain facts by a preponderance – rather than beyond a reasonable doubt – that exposed Petitioner to a sentence exceeding that prescribed by the legislature for the bare offense to which he pled guilty. *Apprendi* itself, in fact, noted that increasing a sentence based on a "second *mens rea* requirement" without submitting the issue to a jury is a classic violation because "[t]he defendant's intent in committing a crime is perhaps as close as one might come to a core criminal offense 'element.'" 530 U.S. at 493. The trial court's finding that Petitioner committed "domestic violence plus deliberate cruelty and commission within the sight or sound of the victim's minor child," App. 15a (citing § 9.94A.390(2)(h)(ii) & (iii)), found a second *mens rea* fact (deliberate cruelty) that is not required for a violation of the second degree kidnapping statute. *See* Wash. Rev. Code § 9A.40.030 (kidnapping statute). It also found an additional *actus reus* fact (domestic violence in the presence of a child) that is not encompassed in that statute. *Compare Jones v.*

United States, 526 U.S. 227 (1999) (fact such as inflicting serious bodily injury that increases maximum sentence must be treated as element of offense).

Neither of the two reasons that the Washington Supreme Court advanced in *Gore* to uphold this upward departure procedure withstands scrutiny. First, the Court noted that Wash. Rev. Code § 9A.20.021 sets forth "maximum sentences" for the various classes of felonies, and that Wash. Rev. Code § 9.94A.120(14) prohibits courts from imposing an exceptional sentence "which exceeds the statutory maximum." *Gore,* 143 Wn.2d at 313-14. Ergo, according to the Court, exceptional sentences in Washington do not violate *Apprendi* because they do not "increase the maximum sentence." *Id.* at 314.

But this argument ignores this Court's admonition in *Apprendi*, which it reiterated in *Ring*, that "[t]he dispositive question . . . 'is one not of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602 (quoting *Apprendi,* 530 U.S. at 494). This means that Washington cannot avoid the man-dates of *Apprendi* simply by labeling the maximum increase for an *upward departure* the "statutory maximum." The critical question under *Apprendi* is what the maximum penalty is "if punished *according to the facts reflected in the jury verdict alone*." *Apprendi,* 530 U.S. at 483 (emphasis added); *accord Ring,* 536 U.S. at 597. That penalty in Washington is indisputably the upper end of the standard range. The fact that an additional statute caps the extent to which a court may depart upward from that range is irrelevant.

Indeed, this Court in *Ring* found an *Apprendi* violation regarding an Arizona procedure that is in all relevant respects the same as Washington's. The Arizona first-degree felony

murder statute "authorizes a maximum penalty of death . . . in a formal sense" because it notes that death is the maximum sentence available for that crime. 536 U.S. at 604 (quotation omitted); *see also id.* at 592. But "[b]ased solely on the jury's verdict finding [a defendant] guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. [citations omitted]. This was so because, in Arizona, a death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist." *Id.* at 597 (quoting *State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001)). This Court thus held that the procedures for finding such an aggravating factor were subject to *Apprendi* because otherwise, "*Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting." *Id.* at 604.[6]

Precisely the same analysis applies here. Because Washington courts may not legally impose an upward departure from the range prescribed by a guilty verdict or plea alone "unless at least one aggravating factor is found to exist," *id.*, the procedures for finding such a factor must comply with *Apprendi*.

Second, the Washington Supreme Court stated that factual determinations underlying exceptional sentences upward are more like the determination at issue in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), than those covered by

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[6] Justice Thomas utilized similar reasoning in *Apprendi* itself in explaining the application of that case's rule: "[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if a legislature defines some core crime and then provides for increasing the punishment of that crime *upon a finding of some aggravating fact* – of whatever sort . . . – the core crime and the aggravating factor together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime" and must be submitted to the jury and proved beyond a reasonable doubt. 530 U.S. at 501 (Thomas, J., concurring) (emphasis added).

Apprendi. *Gore*, 143 Wn.2d at 314. But *McMillan* applies only to facts necessary to impose a certain *minimum* sentence. And this Court in *Apprendi* expressly "limit[ed] [*McMillan*'s] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury verdict – a limitation identified in the *McMillan* opinion itself." 530 U.S. at 487 n.13. The aggravating facts at issue here – as in all upward departures in Washington – do not dictate any minimum sentence. Rather, they allow the "imposition of a sentence more severe than the statutory maximum for the offense established by the jury verdict." *Apprendi*, 530 U.S. at 487 n.13. As such, they are covered by *Apprendi*, not *McMillan*.

B. The Question Presented Is of Great Importance.

The question whether *Apprendi* applies to factual findings necessary to impose upward departures from statutory standard sentencing ranges is one of great importance to the administration of criminal justice in numerous states. In *Apprendi* itself, this Court stated that the constitutional protections against judges increasing sentences based on facts not proved beyond a reasonable doubt are "of surpassing importance." 530 U.S. at 476. The application of these protections to upward departures from statutory standard sentencing ranges is of even more consequence here than it was in *Apprendi*.

Ten states, including Washington, of the seventeen that have sentencing guidelines codify presumptive sentencing ranges from which sentencing courts may depart only upon finding aggravating facts not accounted for in the standard range. Justin Austin, *Sentencing Guidelines, A State Perspective*, No. 235 Nat. Inst. Just. J. 25, 25 (1998); Christina N. Davilas, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to*

Mandatory Sentencing Laws, 87 Cornell L. Rev. 1259, 1274 & n.101 (2002).[7] Because the thousands of courts in these states sentence criminal defendants on practically a daily basis, the uncertainty regarding what procedures the Constitution requires for them to impose upward departures poses a recurring problem. Furthermore, it appears that at least eight other states are actively considering adopting some form of guidelines system. Richard Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines,* 44 St. Louis U. L.J. 425, 427, 446 (2000). These states should have the benefit of this Court's immediate guidance regarding the permissibility of adopting upward departure systems such as the one at issue here.[8]

It is worth making clear, however, that a decision from this Court prohibiting upward departure systems such as

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[7] In addition to Washington, those states are Alaska, Kansas, Michigan, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, and Tennessee. Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines,* 23 Crime & Just. 199, 200-01 (1998) (listing eight of the states); *People v. Riley,* 2003 WL 1795549 (Mich. App. Apr. 3, 2003); *Willis v. State,* 57 P.3d 688, 697-98 (Ak. App. 2002). Seven other states have guideline systems that provide sentencing ranges that function merely "as suggestions that the judge may look to for guidance, but which are nonbinding." Davilas, 87 Cornell L. Rev. at 1274 n.101; *see also* Richard S. Frase, *Is Guided Discretion Sufficient?,* 44 St. Louis U. L.J. 425, 428, 446 (2000) (describing these "voluntary" guideline systems and charting different states' regimes). As such, these states' guidelines are not implicated in this case.

[8] Resolution of the question presented may also affect sentencing systems in other states that do not have, and are not considering, the type guidelines at issue here. Some states that lack "guidelines" nevertheless have broader statutory "presumptive sentencing ranges" from which courts may depart upward based only upon the finding of aggravating circumstances. *See e.g., People v. Rivera,* 62 P.3d 1056 (Colo. App. 2002) (rejecting an *Apprendi* challenge to this type of system and noting that "[t]o the extent that [*State v.*] *Gould* [23 P.3d 801 (Kan. 2001)] can be read to favor a result contrary to that reached here, we decline to follow it").

Washington's would not invalidate the federal sentencing guidelines, or even states' sentencing guidelines. The federal sentencing guidelines, unlike Washington's and other states' guidelines, are not legislative acts. The federal guidelines are promulgated by a Sentencing Commission that resides in the Judicial Branch and that is comprised in part of federal judges. Accordingly, as this Court noted in *Mistretta v. United States,* 488 U.S. 361 (1989), presumptive sentencing ranges under the federal guidelines are "court rules" derived from "judicial rulemaking," *id.* at 386 & 391, not legislative acts. Only the latter trigger *Apprendi*'s "statutory" maximum rule. 530 U.S. at 482; *see also id.* at 481 (judges' sentencing discretion is "bound by the range of sentencing options *prescribed by the legislature*") (emphasis added).

Even states whose legislatures have enacted guidelines with statutory standard sentencing ranges could avoid the constitutional infirmity present here simply by providing that facts supporting upward departures must be submitted to a jury and proved beyond a reasonable doubt (or included in any guilty plea). The remainder of these states' guideline systems are wholly unaffected by the question presented here.

C. This Case Is an Excellent Vehicle for Considering the Question Presented.

Three aspects of this case render it an excellent vehicle for resolving the split of authority concerning whether a fact (other than a prior conviction) necessary for an upward departure from a statutory standard sentencing range must be proved according to the procedures mandated by *Apprendi.* First, this case is on direct review, and Petitioner unambiguously raised the federal constitutional issue presented in a motion before he was sentenced and at each appellate level of the Washington courts. App. 12a, 18a, 69a-70a. Consequently, there is not any retroactivity or other procedural impediment to this Court's considering this issue.

Second, there is every reason to believe that the *Apprendi* violation here was not harmless. The trial court elevated Petitioner's sentence based in part on its finding that his offense manifested deliberate cruelty. App. 17a n.4 & 33a. Yet the trial court acknowledged that this was a "complex" *mens rea* issue here because "[t]here has always been, in this case, a great deal of dispute about such things as [Petitioner's] mental condition at the time that these offenses occurred [and Petitioner's] motivation for doing what he did." App. 32a, 46a. After an evidentiary hearing, it resolved that issue by finding that "[d]efendant's personality disorders did not *significantly* impair his capacity to act with deliberate cruelty." App. 33a (emphasis added). Under these circumstances, a jury forced to find beyond a reasonable doubt that the defendant acted with deliberate cruelty would have been hard pressed to do so.

Third, this case also implicates *Apprendi*'s core concern that the defendant have the "ability to predict with certainty the judgment from the face of the felony indictment" or the four corners of his guilty plea. 530 U.S. at 478. Under the facts encompassed in Petitioner's guilty plea, the maximum sentence he could receive was 53 months. But the trial court, without the consent of the defendant or even the State, imposed a sentence that was 37 months longer than this statutory limit, based on additional facts that Petitioner hotly disputed. When Petitioner learned of this increased sentence, he moved to withdraw his plea. But the trial court, again, ruled against him. App. 7a.

The central thrust of *Apprendi* is that a defendant should have the right to contest before a jury any fact necessary to increase his sentence above an otherwise applicable statutory limit. And the State should have to prove such a fact beyond a reasonable doubt. This Court should grant certiorari to resolve the conflict of authority regarding the upward departure system at issue here and to prevent defendants such as Petitioner from

being blindsided by court-imposed sentences longer than they could have predicted from their indictments or guilty pleas.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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May 5, 2003

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	No. 19545-7-III
	)	
Respondent	)	
	)	Division Three
v.	)	Panel Six
	)	
HOWARD RALPH BLAKELY,	)	PUBLISHED OPINION
	)	
Appellant.	)	Filed May 23, 2002

SCHULTHEIS, J. -- Howard Ralph Blakely pleaded guilty to one count of second degree kidnapping and one count of second degree assault. Consistent with the plea agreement, the State recommended the high end of the standard range. After a sentencing evidentiary hearing, where the State presented testimony from the victims and mental health professionals, the trial court imposed an exceptional sentence upward. Mr. Blakely now appeals, contending the State violated the plea agreement by advocating for an exceptional sentence. He also challenges the constitutionality of the sentence and the sentencing hearing. Pro se, he claims he had ineffective assistance of counsel and alleges various acts of misconduct by the State. Finding no error, we affirm.

FACTS

Mr. Blakely and Yolanda Blakely were married in 1973. They raised three children: two daughters and their youngest son, Ralphy. The family acquired considerable real property during the marriage, including a home, ranch, and development property in Montana; a home and orchard in Grant County; a lake home; and rental properties. In order to

protect this property from creditors and tax liability, they created a trust known as the Blakely Farms Trust.

In 1995, Ms. Blakely moved to Spokane from Montana, filed for divorce, and obtained a restraining order against Mr. Blakely. One year later, the trustee for the Blakely Farms Trust filed a petition for a declaration of the validity of the trust and for an accounting. In December 1997, the Spokane divorce court authorized Ms. Blakely to move into the Grant County home and to operate the orchard. Her son Ralphy joined her there in June 1998.

On the afternoon of October 26, 1998, about two weeks before the trust litigation was set to begin, Mr. Blakely surprised Ms. Blakely as she walked back from her mailbox. He pushed her to the ground, wrapped duct tape around her mouth and head, and taped her wrists together. Apparently very angry, he told Ms. Blakely he wanted her to dismiss the dissolution and trust proceedings. Noting that O.J. Simpson had gotten away with what he did, Mr. Blakely warned his wife to cooperate or he would kill her and Ralphy. He told her he had many guns, ammunition, and several knives. He then forced her to climb into his pickup canopy, where he locked her in a coffin-like plywood box that he had constructed. The box was about the same width and length as Ms. Blakely's body and had air holes drilled into each end. Ms. Blakely heard her husband loading items from the house into the truck. On several occasions, he opened the lid of the box, pressed a knife blade to Ms. Blakely's neck or nose, and demanded to know where various items could be found. As night fell and it became cold, Mr. Blakely put a quilt over his wife in the box.

Ralphy, age 13, arrived home from football practice after dark. His father met him in the driveway, told him his mother was in great danger, and told him not to cause any trouble. They walked to the pickup, where Ralphy heard his

mother yelling from the box. Mr. Blakely ordered Ralphy to drive his mother's car and warned him that if he "tried anything," Mr. Blakely would shoot the box with a shotgun. Clerk's Papers (CP) at 626.

Mr. Blakely drove the pickup out of the orchard and headed east, with Ralphy following in his mother's car. Eventually they stopped at a truck stop on the outskirts of Moses Lake for gas. When Ralphy and his father entered the truck stop to pay, Ralphy shouted, "Call 9-1-1! Help us! He kidnapped us! He has my mom in a box!" CP at 627. Mr. Blakely tried to drag Ralphy to the car, but truckers shouted to him to leave the boy alone.

He released Ralphy, ran to the pickup, and took off. Ralphy jumped on the pickup bumper and tried to release his mother from the box, but was knocked off when Mr. Blakely accelerated. Ralphy was left behind at the truck stop.

During the subsequent trip to Montana, Mr. Blakely removed the tape from his wife's head and let her sit in the front seat so she could tell any police who stopped them that she was accompanying him of her own free will. He was angry because "Ralphy ruined everything!" CP at 627. On occasion, Mr. Blakely forced Ms. Blakely back into the box. In all, she was locked in the box for over four hours.

They eventually arrived at the house of Mary Gillespie, who lived close to their Montana home. Mr. Blakely let his wife enter Ms. Gillespie's house while he called their older daughter and demanded that she stop the divorce and trust litigation. He also called a stockbroker, received stock quotations, and gave the broker sell orders. Meanwhile, Ms. Blakely and Ms. Gillespie surreptitiously planned to call for help. When Mr. Blakely sent Ms. Gillespie on an errand to a nearby house, she called the police. Officers soon arrived and Mr. Blakely sent his wife

out to tell them that she had come to Montana voluntarily. Instead, she reported that she had been kidnapped, and he was arrested without incident.

Mr. Blakely was charged in federal court with two counts of kidnapping. These charges were later dismissed and the State filed two charges of first degree kidnapping, each involving domestic violence, in October 1998. He pleaded not guilty, with a defense of insanity or diminished capacity.

Mr. Blakely has been diagnosed at various times since 1972 as suffering from schizophrenia. The trial court in the Blakely Farms Trust litigation held a hearing in February 1999 to determine whether the court should appoint a guardian ad litem to represent Mr. Blakely's interests in the trust and dissolution actions. Based on his psychiatric history and a psychologist's recent conclusion that Mr. Blakely suffered "clear mental deficiencies," Def.'s Ex. 2, the civil court appointed a guardian ad litem in early March 1999.

Within days, the State in the criminal action obtained an order for an evaluation at Eastern State Hospital of Mr. Blakely's competency. After reviewing Mr. Blakely's 27-year psychiatric history as well as the results of his current examination, evaluators Dr. Vern Cressey and Dr. Timm Fredrickson concluded that he had high average intelligence, had never been a paranoid schizophrenic, and suffered instead from a severe personality disorder with schizotypal and narcissistic components. Noting his multiple legal difficulties over the years, their report also surmised that Mr. Blakely only sought psychiatric treatment when he was "embroiled in legal issues." CP at 70. On the basis of this evaluation, the criminal trial court entered an order of competency in May 1999.

Because defense counsel continued to have difficulty communicating with Mr. Blakely, the trial court ordered another evaluation in September 1999 to determine whether Mr. Blakely could assist counsel and appreciate the import of the criminal proceedings. The report from this round of evaluations stated that Mr. Blakely began the stay at Eastern with "elective mutism" and "struggl[ed] to find something wrong with himself physically." CP at 291. In the opinion of the evaluators, he was well aware of the court proceedings--including the options and consequences of various pleas--and he had the capacity to understand and assist in his own defense. Despite the evaluation results, defense counsel demanded a jury trial on the issue of Mr. Blakely's competency to stand trial. Finding that RCW 10.77.090 authorizes a pretrial jury determination of competency, the trial court granted the motion.[1]

The criminal competency trial was held in April 2000. Mr. Blakely's counsel sought to introduce the trust court's order appointing the guardian ad litem. This order included a finding that Mr. Blakely "is not competent at this time [March 1999] to comprehend with understanding and intelligence the significance of the entire legal proceedings and their effect on and relationship to his best interests." Def.'s Ex. 1, at 2. Although the criminal trial court found that the civil court's order was not really an adjudication of incompetence, it decided to allow admission of the order at the competency hearing. Later, when defense counsel objected to the trial court's refusal to instruct the jury that the civil court's order raised a rebuttable presumption of incompetence, the trial court ruled as a matter of law that the

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[1] RCW 10.77.090(1) provides that the trial court may order a defendant who is suspected to be incompetent to undergo an evaluation for up to 90 days. After that time, "if the jury or court, as the case may be, finds that the defendant is incompetent, the charges shall be dismissed without prejudice." Former RCW 10.77.090(3) (1989) (relating to defendants charged with felonies).

order appointing the guardian ad litem did not constitute an adjudication of incompetence. The jury found that Mr. Blakely was competent to stand trial on the criminal charges.

Trial was set for July 2000. On July 18, the court conducted a hearing on a plea agreement. The State offered to amend the charges to one count of second degree domestic violence kidnapping with a deadly weapon enhancement (RCW 9A.40.030(l), 10.99.020, former 9.94A.125 (1983)) and one count of second degree domestic violence assault (RCW 9A.36.021(l)(c), 10.99.020). In exchange for the amended charges and a recommendation for a sentence in the high end of the standard range, Mr. Blakely agreed to an *Alford* plea of guilty.[2] Although Mr. Blakely complained that he could not think clearly due to the intolerable conditions in his jail cell, the trial court eventually determined that Mr. Blakely understood the charges and the agreement.

At the sentencing hearing two weeks later, Mr. Blakely attempted to withdraw the guilty plea, claiming he was pressured by his doctors and lawyers. Finding that it was not credible that Mr. Blakely was under duress or was misled, the trial court denied the motion to withdraw. The State then told the court the standard range for the kidnapping charge with the deadly weapon enhancement was 49 to 53 months and recommended the high end of that range to run concurrently with a sentence of 12 to 14 months for the assault. Before pronouncing sentence, the trial court asked for Mr. Blakely's comments and asked Ms. Blakely to describe her ordeal during the kidnapping. During her testimony, defense counsel protested that she was giving new

[2] See *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (a defendant may plead guilty while disputing the facts alleged by the prosecution).

information without being under oath. In response, the trial court told her to leave out extraneous details. Ultimately, the trial court rejected the State's recommendation for a standard range sentence and imposed an exceptional sentence of 90 months for the kidnapping, citing the aggravating factors of deliberate cruelty and commission of domestic violence in the presence of a minor child.

In August 2000, Mr. Blakely objected to the exceptional sentence and the trial court continued the matter for an evidentiary hearing. The court asked the State to subpoena Ms. Blakely and other witnesses and admitted it should have held a hearing with witnesses under oath and subject to cross-examination before imposing the exceptional sentence. Before the sentencing hearing, Mr. Blakely again moved to withdraw his guilty plea, arguing that the State violated the plea agreement by advocating for an exceptional sentence. The trial court found that the State's sentencing brief did not suggest what the court ought to do, and denied the motion.

At the sentencing hearing held in October 2000, Ms. Blakely, Ralphy, various mental health experts, and a police officer were examined and cross-examined. After hearing a statement from Mr. Blakely, the trial court again imposed an exceptional sentence of 90 months on the kidnapping charge, to run concurrently with a standard sentence of 14 months on the assault charge. Mr. Blakely's motion to vacate the sentence was denied in January 2001 and this appeal followed.

PRESUMPTION OF INCOMPETENCE

Mr. Blakely first challenges the jury instructions given in the competency trial. He contends the trial court erred in refusing to instruct the jury that a defendant is presumed

incompetent to stand trial if there is proof of a mental illness adjudication.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and properly inform the jury of the applicable law. *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). Mr. Blakely argued at the competency trial that the civil court's conclusion that he lacked competence to represent himself in the trust and dissolution proceedings raised a presumption of incompetence to stand trial on the criminal charges.

Although the trial court allowed admission of the civil court's findings, it held as a matter of law that the civil order did not constitute an adjudication of incompetence. On that basis, the trial court declined to instruct the jury that a mental illness adjudication rebutted the presumption of competence. The trial court properly found that neither the evidence nor the law supported Mr. Blakely's proposed instruction.

The test for competency to stand trial is whether the defendant is able to understand the proceedings against him or her and can assist in his or her defense. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). A rebuttable presumption of mental incompetency is raised by proof of a mental illness adjudication. *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982); *State v. Bonner*, 53 Wn.2d 575, 587-88, 335 P.2d 462 (1959). On the other hand, "[i]t is the fact of mental incompetency, and not the adjudication of mental illness, that determines one's inability to form an intent to commit an offense, or his inability, after an offense has been committed, to aid in his defense." *Id.* at 586 (emphasis omitted).

The civil court deciding Mr. Blakely's trust and dissolution cases found that the weight of past and current psychological evaluations supported a finding that Mr. Blakely was not competent to understand the nature and complexity of the trust issues. Consequently, a guardian ad litem was appointed to represent his interests in those cases only. Mr. Blakely was not, however, adjudged to have a mental illness or to be generally incompetent. As the civil court stated in its order appointing the guardian ad litem, "The court's findings and conclusions in this case shall have no precedential or preclusive effect on any other civil or criminal proceeding involving Ralph H. Blakely, Jr. and the matters at issue therein." Def.'s Ex. 1, at 2. Because the civil court's order did not presume to apply beyond the time frame and issues of the trust and dissolution proceedings, it did not constitute an actual adjudication of mental illness. The order served as relevant evidence of Mr. Blakely's ability to understand the criminal proceedings and to assist in his defense, but it did not give rise to a presumption that Mr. Blakely was incompetent. Consequently, the order did not support an instruction declaring that proof of a prior mental illness adjudication raised a presumption of incompetence. *Irons*, 101 Wn. App. at 549. Violation of the Plea Agreement Mr. Blakely's next contention is that the prosecutor violated the plea agreement by advocating for an exceptional sentence upward. He argues that the prosecutor effectively undercut the recommendation of a standard sentence by discussing in the sentencing brief recent decisions on the factual bases for exceptional sentences and by eliciting testimony at the sentencing hearing to support aggravating factors.

A plea bargain is a contract between the criminal defendant and the prosecutor. *State v. Talley*, 134 Wn.2d 176, 182, 949 P.2d 358 (1998); *State v. Sledge*, 133 Wn.2d 828, 838-39 n.6, 947 P.2d 1199 (1997). Due process requires the prosecutor to adhere to the terms of the contract by

recommending the agreed-upon sentence. *Talley*, 134 Wn.2d at 183; *Sledge*, 133 Wn.2d at 839. The prosecutor's conduct at the sentencing hearing must not undercut the plea bargain:

> Although the recommendation need not be made enthusiastically, the prosecutor is obliged to act in good faith, participate in the sentencing proceedings, answer the court's questions candidly in accordance with RPC 3.3 and, consistent with RCW 9.94A.460, not hold back relevant information regarding the plea agreement.[3]

Talley, 134 Wn.2d at 183. Mere participation in an evidentiary hearing convened by the court to determine whether evidence supports an exceptional sentence will not undercut the State's agreed-upon sentence recommendation. *Id.* at 185-86.

Mr. Blakely cites *In re Pers. Restraint of Palodichuk*, 22 Wn. App. 107, 589 P.2d 269 (1978) for the principle that less than wholehearted support for the terms of the plea bargain can constitute a breach. In *Palodichuk*, the prosecutor recommended a suspended sentence and probation, but then told the court he had obtained new

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[3] RPC 3.3 states:

"(a) A lawyer shall not knowingly:

"(1) Make a false statement of material fact or law to a tribunal."

"A prosecutor, like any other attorney, has a duty of candor toward the tribunal which precludes it from making a false statement of material fact or law to such tribunal." [*State v.*] *Coppin*, 57 Wn. App. [866,] 874 n.4[, 791 P.2d 228 (1990)].

RCW 9.94A.460 states in part:

"The prosecutor shall not agree to withhold relevant information from the court concerning the plea agreement."

information that gave him "second thoughts about that recommendation." *Id.* at 109 (emphasis omitted). The prosecutor's reservations did more than express less than wholehearted support for the terms of the plea bargain, they seriously undercut the agreement. *See Talley*, 134 Wn.2d at 184 (discussing *Palodichuk*).

Similarly, the prosecutor in *Sledge* recommended a standard range sentence for a juvenile offense, but then extensively examined the probation counselor concerning her reasons for recommending an exceptional sentence, presented the testimony of a parole officer who reported problems with the juvenile, and gave a detailed summary of the aggravating factors to the court. The Supreme Court found that the prosecutor's fervor in setting out and emphasizing evidence supporting the aggravating factors undercut the plea bargain. *Sledge*, 133 Wn.2d at 842-43.

As the Supreme Court stated in *Talley*, 134 Wn.2d at 183, the prosecutor need not make the agreed sentencing recommendation enthusiastically, but must not appear to advocate for an exceptional sentence. The State's mere participation in an evidentiary hearing-presenting relevant evidence to the court and responding to its inquiries-will not constitute a breach of the plea bargain, while advocacy for an exceptional sentence by placing emphasis on aggravating factors will. *See Talley*, 134 Wn.2d at 186; *Sledge*, 133 Wn.2d at 843.

Here, the prosecutor consistently told the court he recommended the high end of the standard range. At the July 2000 sentencing hearing, the court found two aggravating factors-deliberate cruelty and domestic violence in the presence of the minor child-and imposed an exceptional sentence. When the trial court later decided it needed to conduct an evidentiary hearing to consider the evidence supporting an exceptional sentence, the prosecutor responded

that "[w]e of course are not proponents of an exceptional sentence in these proceedings," but asked if he should subpoena witnesses. Report of Proceedings (RP) at 563. The court asked him to subpoena Ms. Blakely and any witnesses who observed Ralphy during the kidnapping incident. However, the court added, the evidentiary hearing was probably an "exercise in futility," because there was no dispute that Mr. Blakely put his wife in an apple wood box and kept her there in the presence of Ralphy. RP at 564. Apparently the trial court intended to impose an exceptional sentence based on the record, regardless of the State's recommendation.

Most of the evidence challenged by Mr. Blakely was presented by the State in response to assertions by the defense. For instance, before the evidentiary hearing, the State filed a response brief to Mr. Blakely's motion for a standard range sentence. Mr. Blakely had argued that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) prohibited the trial court from imposing an exceptional sentence based on facts that had not been established by a jury beyond a reasonable doubt. The State's response brief examined the precedential effect of *Apprendi* and concluded that "[t]he court is not required to provide the defendant with a jury trial on the issue of whether an exceptional sentence will be imposed." CP at 578. Defense counsel moved to withdraw the guilty plea on the basis that the State's response brief violated the plea agreement by advocating for an exceptional sentence. In response, the prosecutor stated, "I hope that I have never at any point done anything that the court has interpreted as advocating an exceptional sentence in this case, because I did have an agreement with counsel which prohibited me from doing that.' RP at 585. In denying the motion to withdraw the guilty plea, the court found that the State's response brief did not advocate a particular sentence and did not give "even the

narrowest suggestion of what the court ought to do." RP at 586.

As would be expected, the prosecutor's involvement in the evidentiary hearing was problematical. He was required to conduct examinations and cross-examinations of the witnesses in a manner that would present an accurate record to the court, while at the same time refraining from advocacy for the exceptional sentence he knew the court intended to impose. *See Talley*, 134 Wn.2d at 183. During the examination of Ms. Blakely, the prosecutor asked if she was afraid of Mr. Blakely during the kidnapping. She answered yes. It was the court, not the prosecutor, who asked a psychologist defense witness if Mr. Blakely could deliberately act in a cruel way. The witness answered that he could not make an opinion. Later, when the State presented the testimony of two mental health witnesses, the prosecutor anticipated the court's question and asked each of them if Mr. Blakely had the capacity to be cruel. Both answered that he did.

Following this testimony, the court asked the prosecutor if he wished to be heard regarding the sentence recommendation. He responded, "Judge, [I] don't want to be heard right now. My understanding was that we had an agreed recommendation for a high end sentence, and that's what I continue to recommend to the court. Unless counsel wants to deviate from that recommendation, I don't have anything to say." RP at 1038.

Compared to the "second thoughts" expressed in *Palodichuk*, 22 Wn. App. at 109, and the detailed summary of aggravating factors given by the prosecutor in *Sledge*, 133 Wn.2d at 843, the prosecutor's conduct here does not rise to advocacy for an exceptional sentence. Unlike in *Sledge*, where the State insisted upon the evidentiary hearing with witnesses, here defense counsel moved for the hearing. As

an officer of the court, the prosecutor was obliged to participate in the hearing, to call witnesses that would be helpful to the court, and to anticipate the questions the court wished to ask. *See Sledge*, 133 Wn.2d at 840. The State walks a thin line between, on the one hand, maintaining its duty to present relevant evidence and respond to the sentencing court's inquiries, and on the other hand, meeting its equally important obligation to uphold the plea agreement. *Talley*, 134 Wn.2d at 187. The important point is that the State must not in the process contradict its recommendation for a standard range sentence. *Sledge*, 133 Wn.2d at 840.

On balance, considering the sentencing court's conclusion from the start that undisputed facts in the record supported an exceptional sentence based on domestic violence and deliberate cruelty, the prosecutor's conduct in the evidentiary hearing did not undercut his insistence that he recommended a standard range sentence. Addressing this issue, the trial court noted that it tried to pay attention to the prosecutor's conduct in regard to the difficult position in which the State was put by having recommended to the court a sentence within the standard range, having the court indicate that an exceptional sentence may be appropriate, having the court indicate those subjects that would need to be presented at a sentencing hearing, and then having the laboring oar in presenting the testimonial matters to the court. RP at 1056. The sentencing court concluded that the prosecutor confined himself to the matters that concerned the court and did not advocate for an exceptional sentence. The record supports that conclusion. Consequently, the State did not breach the plea agreement.

EXCEPTIONAL SENTENCE

Mr. Blakely next challenges his exceptional sentence. The trial court found two aggravating factors: (1) Mr. Blakely's conduct during the kidnapping manifested

deliberate cruelty to his wife, former RCW 9.94A.390(2)(a) (1997); and (2) the offense involved domestic violence plus deliberate cruelty and commission within sight or sound of the victim's minor child, former RCW 9.94A.390(2)(h)(ii), (iii) (1997). Mr. Blakely contends the aggravating factors violate the real facts doctrine, former RCW 9.94A.370(2) (1996). He also contends the sentencing court violated the holding in *Apprendi*, 530 U.S. at 490, that requires a jury determination of the facts used to support an exceptional sentence outside the maximum range. Finally, he asserts the sentencing hearings violated due process by preventing defense counsel from cross-examining Ms. Blakely and by denying him the right to allocution.

I. The Real Facts Doctrine.

Under the Sentencing Reform Act of 1981, a trial court must impose a sentence within the standard range for the offense unless the court finds substantial and compelling reasons justifying an exceptional sentence. Former RCW 9.94A.120(1), (2) (1998); *State v. Ferguson*, 142 Wn.2d 631, 64344, 15 P.3d 1271 (2001). Several nonexclusive mitigating and aggravating factors are provided in former RCW 9.94A.390 (1997), including the mitigating circumstance of diminished capacity (former RCW 9.94A.390(1)(e) (1997)) and the aggravating circumstances mentioned above. In reviewing an exceptional sentence, this court asks three questions: (1) Are the reasons given by the sentencing court supported by the record, using the clearly erroneous standard of review? (2) Do the reasons justify departure from the standard range as a matter of law? (3) Is the sentence clearly too excessive or too lenient, using the abuse of discretion standard of review? *Ferguson*, 142 Wn.2d at 646.

Mr. Blakely contends the trial court erred as a matter of law in considering facts that established a more serious

crime than that to which he pleaded guilty. The so-called real facts doctrine of former RCW 9.94A.370(2) (1996) provides that the sentencing court generally may not use facts that establish a more serious crime or additional crimes as the basis for a sentence outside the presumptive range. In exchange for dismissing the charge of first degree kidnapping, the State agreed to allow Mr. Blakely to plead guilty to second degree kidnapping. As charged in the original information, the first degree kidnapping count alleged intentional abduction of a person with the intent to inflict extreme mental distress. RCW 9A.40.020(1)(d). Second degree kidnapping does not include the same intent element. RCW 9A.40.030. Mr. Blakely contends the finding of deliberate cruelty constitutes the same element as intent to inflict extreme mental distress, in effect allowing the court to sentence him for the more serious crime.

Deliberate cruelty has been defined as "gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself." *State v. Scott*, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993), *aff'd sub nom. State v. Ritchee*, 126 Wn.2d 388, 894 P.2d 1308 (1995), quoted in *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996). In *Ferguson*, 142 Wn.2d at 648-49, the Supreme Court held that deliberate cruelty could not be used to elevate a sentence for second degree assault because an element of the charge is the intent to do bodily harm. The court found that the defendant's charged offense, intent to inflict harm by exposing another to the human immunodeficiency virus (HIV), implicitly contains elements that constitute deliberate cruelty. *Id.* at 651.

Citing *Ferguson*, Mr. Blakely contends deliberate cruelty is implicitly the same as the infliction of extreme mental distress element of first degree kidnapping, and therefore violates the real facts doctrine. But gratuitous violence with the intent to inflict emotional pain (deliberate

cruelty, *Scott*, 72 Wn. App. at 214) is not the same as the intent to inflict extreme mental distress. Even under the precedent of *Ferguson*, therefore, the real facts doctrine likely does not preclude deliberate cruelty as an aggravating factor in an exceptional sentence for second degree kidnapping. However, recognizing that *Ferguson* may direct a different conclusion, we decline to affirm the exceptional sentence on the basis of deliberate cruelty under former RCW 9.94A.390(2)(a) (1997). Instead, we find that the domestic violence aggravating factors alone support the exceptional sentence.

We begin by noting that the real facts doctrine does not apply to the domestic violence aggravating factors of former RCW 9.94A.390(2)(h) (1997). Former RCW 9.94A.370(2) (1996). The real facts statute specifically allows the court to consider acts of domestic violence that involve deliberate cruelty or intimidation of the victim as well as acts of domestic violence committed in the presence of the victim's or offender's minor child. Former RCW 9.94A.370(2) (1996); former RCW 9.94A.390(2)(h)(ii), (iii) (1997). Because the trial court found that these aggravating circumstances also supported a departure from the standard range, the exceptional sentence is justified as a matter of law.[4] *State v. Cardenas*, 129 Wn.2d 1, 12, 914 P.2d 57 (1996) (an appellate court may uphold an exceptional

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[4] At oral argument, the State admitted that the trial court was not sure if the aggravating factor of domestic violence in the presence of the minor child, standing alone, would support an exceptional sentence. The record indicates, however, that the trial court considered deliberate cruelty and domestic violence with deliberate cruelty sufficient to support the sentence. Whether or not deliberate cruelty under former RCW 9.94A.390(2)(a) (1997) could be used to elevate the sentence for second degree kidnapping, the alternate basis of domestic violence with deliberate cruelty supports the exceptional sentence here. *State v. Cardenas*, 129 Wn.2d 1, 12, 914 P.2d 57 (1996).

sentence if satisfied that the trial court would have imposed the same sentence without the prohibited aggravating factor).

Mr. Blakely additionally contends that the sentence of 90 months is excessive in light of the standard range sentence of 13 to 17 months for second degree kidnapping. Former RCW 9.94A.310 (1998); former RCW 9.94A.320 (1998). He fails to take into consideration the firearm enhancement of 36 months, which makes the high end of the standard range for this crime 53 months. Former RCW 9.94A.310(3)(b) (1998). We will not disturb the trial court's discretion unless we find that no reasonable judge would have imposed the same sentence. *Cardenas*, 129 Wn.2d at 13. Here, the trial court stated that "[t]here is a part of the court's thinking that suggests that 90 months as an exceptional sentence is an insufficient judicial response to this conduct." RP at 1053. Given the circumstances of the crime, we cannot say that no reasonable judge would have made the same decision. *Cardenas*, 129 Wn.2d at 13.

II. Application of *Apprendi*.

Mr. Blakely contends the United States Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) provides that the factual basis for an exceptional sentence upward must be submitted to a jury and proved beyond a reasonable doubt. However, recently the Washington Supreme Court in *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (2001) held that *Apprendi* does not apply to factual determinations that support reasons for exceptional sentences upward. *Gore* held that Washington's statutory scheme permits a judge to impose an exceptional sentence within the maximum range determined by the Legislature. *Id.* at 313-14. Because the statutory and nonstatutory aggravating factors neither increase the maximum sentence nor define separate offenses calling for separate penalties, the *Apprendi* rule is not

triggered. *Id.* at 314. Consequently, the facts supporting the exceptional sentence here did not have to be submitted to a jury or proved beyond a reasonable doubt. *Id.* at 315; *see also State v. Hopkins*, 109 Wn. App. 558, 569, 36 P.3d 1080 (2001).

III. Due Process and the Sentencing Hearing.

During the first sentencing hearing, defense counsel did not cross-examine Ms. Blakely during her victim's statement. He now contends he was entitled by due process to confront the witnesses at the sentencing hearing and further contends he was not granted a formal opportunity for allocution.

The Sixth Amendment confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Generally, due process is satisfied in the context of a sentencing hearing as long as the defendant has an opportunity to rebut the evidence presented. *State v. Strauss*, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992). While the effect of the confrontation clause on sentencing hearings has not yet been established in Washington, *id.* at 414-15, we need not reach this issue here because Mr. Blakely was given the opportunity to cross-examine Ms. Blakely and all the other witnesses at the evidentiary hearing. Ms. Blakely's testimony in the first sentencing hearing constituted a victim impact statement rather than evidence to support an aggravating factor. *See* former RCW 9.94A.110 (1998). When she testified as a witness at the subsequent evidentiary hearing, however, defense counsel cross-examined her as extensively as he did all the other witnesses.

As for Mr. Blakely's right of allocution, he seems to argue that he was denied the opportunity to give a formal statement before sentence was pronounced. A defendant's

right of allocution is derived from state statutes and is not constitutional in nature. *In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 335, 6 P.3d 573 (2000). As with the victim impact statement, the offender is provided an opportunity to address the sentencing court before sentence is imposed. Former RCW 9.94A.110 (1998); *Echeverria*, 141 Wn.2d at 335. The statute does not require that the offender's statement be made immediately before imposition of the sentence and does not require a formal request from the court. *Id.* at 336.

In this case, the trial court asked Mr. Blakely at the first sentencing hearing and at the evidentiary hearing if there was anything he wanted to say. On both occasions Mr. Blakely took the opportunity to explain to the court his version of the events and the motivations of the witnesses against him. Although the trial court did not specifically ask Mr. Blakely if he had anything to say in mitigation of the sentence-the better course to scrupulously comply with former RCW 9.94A.110 (1998), according to *Echeverria*, 141 Wn.2d at 336-37-clearly Mr. Blakely understood that he was asked whether he had information that supported a lower sentence.

PRO SE ISSUES

Mr. Blakely raises additional issues pro se, including contentions that the State withheld evidence, that the weapon enhancement was added as retaliation for Mr. Blakely's complaints against jail conditions, and that his counsel was ineffective.

According to the pro se brief, the State failed to produce the registration on the truck used in the kidnapping and withheld evidence that proved Ms. Blakely used poison to control his actions during the kidnapping. Mr. Blakely also alleges that the prosecutor withheld a copy of a 1995

social security disability form that shows his wife attempted to cheat the government by forging Mr. Blakely's name to a false claim. Besides the fact that Mr. Blakely fails to show how the alleged withholding of this evidence affected his guilty plea, he also fails to show any reference in the record to the purported evidence. Matters mentioned in the brief but not included in the record cannot be considered on appeal. *State v. Stockton*, 97 Wn.2d 528, 530, 647 P.2d 21 (1982), cited in *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Similarly, the record shows no evidence to support an inference that the State added the deadly weapon enhancement in retaliation for Mr. Blakely's threat to sue Grant County for intolerable jail conditions. In April 2000, Mr. Blakely filed "A Claim for Discrimination and Negligence and Punishment" that alleged he had been forced to live in isolation with bacterial and viral infections, had been denied an operation that would have fixed his "brain functions," and had been mistreated by inmates and staff at the jail. CP at 399-400. He requested a settlement of $5 million on the claim. Beyond the accusations in the claim, nothing in the record supports the validity of these assertions. The amended information adding the deadly weapon enhancement to the two first degree kidnapping charges was filed in July 2000. Although the amendment was made after Mr. Blakely's discrimination claim, nothing in the record supports an inference that it was made in retaliation for Mr. Blakely's threat to sue.

Insufficient record also defeats Mr. Blakely's contention that he received ineffective assistance of counsel. To prove ineffective counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's representation prejudiced the defendant. *McFarland*, 127 Wn.2d at 334-35. Attorney competency is determined based only on the record below.

Id. at 335. We engage a strong presumption that counsel was effective. *Id.* Mr. Blakely contends his counsel was deficient in failing to attend his court-ordered mental health evaluations, in pressuring him to enter into the guilty plea without explaining the possible sentence, and in failing to gather the necessary evidence to impeach his wife's testimony.

Defendants in noncapital cases generally do not have a right to have counsel present during psychological examinations. *State v. Decker*, 68 Wn. App. 246, 251, 842 P.2d 500 (1992). Counsel may attend, but strictly as an observer, not as an active participant. *State v. Nuss*, 52 Wn. App. 735, 741, 763 P.2d 1249 (1988). When a defense of diminished capacity is raised, the defendant waives his privilege against self-incrimination. *Id.* at 742. Nothing in the record indicates that Mr. Blakely ever requested the presence of counsel at his mental health evaluations or that the presence of counsel would have been of any benefit to his case.

The record also fails to show that defense counsel pressured Mr. Blakely to accept the terms of the plea agreement. A guilty plea must be entered knowingly, voluntarily, and intelligently. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The defendant must understand the plea's direct sentencing consequences. *Id.* A claim that the defendant was coerced to plead guilty must be supported with more than self-serving allegations. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

During the hearing on the plea agreement held in July 2000, the court asked Mr. Blakely if he understood the terms of the agreement, the sentence range, and the fact that the trial court was not bound by the terms of the agreement to impose the sentence recommended by the State. Mr. Blakely first asked to die and claimed his mind was not clear due to

lack of sleep, but eventually agreed that he understood. He went over the plea agreement with the court and with trial counsel before signing. Only later did he claim his doctors and lawyers pressured him into signing the agreement. Nothing in the record beyond his bare assertion of fact supports his allegations that the plea was involuntary.

Finally, the record does not support Mr. Blakely's assertion that defense counsel failed to investigate evidence that Ms. Blakely orchestrated the kidnapping by poisoning her husband and controlling his mind. As with the other claims of ineffective assistance of counsel, our review on direct appeal is limited to matters within the trial record. *McFarland*, 127 Wn.2d at 335. With support for Mr. Blakely's claims nonexistent in this record, we are compelled to find that defense counsel's representation was effective.

Affirmed.

/s/
Schultheis, J.

WE CONCUR:

/s/
Sweeney, J.

/s/
Kurtz, J.

SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON,	)	
	)	No. 98-1-00610-5
Plaintiff,	)	
	)	FINDINGS OF
vs.	)	FACT &
	)	CONCLUSIONS
HOWARD RALPH BLAKELY,	)	OF LAW RE:
	)	EXCEPTIONAL
Defendant.	)	SENTENCE
	)	

An exceptional sentence above the standard range should be imposed herein based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The defendant and Yolanda Blakely married in 1973. They raised three children, Becky, Lorene and Ralph III (Ralphy). In May 1995, Yolanda left the family home with Lorene and Ralphy, eventually settling in Spokane. There she filed a divorce action in August, 1995.

2. During the marriage, the Blakelys created a trust, known as the Blakely Fay Trust, as a tax shelter. In 1996, Yolanda commenced a lawsuit to unravel the trust. There was also other litigation, and a great deal of animosity, between the Blakelys after their separation. Mrs. Blakely obtained a restraining order in the divorce case to prohibit the defendant from approaching her or her home.

3. The Blakelys acquired a considerable number of real properties, including a home, ranch and development property in Three Forks, Montana, an orchard and home in

Grant County, a lake home, and several rental properties. In December, 1997, Mrs. Blakely obtained from the Spokane divorce court authority to occupy the home and orchard. She moved to that property and undertook management of the orchard in January, 1998. In June, 1998, Ralphy joined her, having remained in Spokane to finish the seventh grade. Yolanda obtained a modification of the subsisting restraining order to prohibit the defendant from approaching the orchard property.

4. In October, 1998, Ralphy was attending 8th grade in Royal City and helping with the orchard. Harvest was completed around mid-October. Ralphy regularly left on a bus for school around 6:00 a.m., and returned on a bus about 6:00 to 6:30 p.m., after football practice.

5. The Blakely home was located in roughly the middle of the east side of the orchard. Just after 3:00 p.m. on October 26, Yolanda walked from the area of the house to the southeast corner of the property, about 900 feet, along a road/driveway, to retrieve her mail. As she returned, the defendant emerged from the apple trees south of the house. He approached Yolanda, pointing out a spider on her mail. As she disposed of the spider, she saw that the defendant appeared very angry. He grabbed her wrists and arms, twisting them. A scuffle ensued.

6. The defendant got Yolanda down on the ground near the first row of trees. He pinned her to the ground by painfully driving his knee into her ribs, and pulled a roll of duct tape from a plastic sack in his rear pocket. He attempted to cover her mouth with duct tape, wrapping it several times around her head, face and chin. He taped her wrists together very tightly.

7. The defendant carried Yolanda to an area between the rows of apple trees. In a very angry voice, the defendant said

during this time, "You had no business filing the divorce--I want it dismissed;" "I want the trust litigation dismissed;" and "cooperate with me so you won't get hurt any more." The defendant walked Yolanda west through the orchard on a service road, saying, "We need to get ahold of Lorene to help get the trust litigation dismissed." He also mentioned "O.J." and a "Dr._____" getting away with what they did, suggesting he would too.

8. At the end of the service road, the defendant led Yolanda south to a place where he had hidden his pickup truck from view in some willow trees near the southwest corner of the orchard. He told her that he had many guns and ammunition, and several knives, with him. He told her that if she failed to cooperate, they were both going to die.

9. Mr. Blakely opened the lift gate of the pickup canopy, revealing in the bed of the pickup a coffin-like plywood box. He produced a knife, and ordered Yolanda to climb into the box. Yolanda climbed slowly over the pickup tailgate, and the defendant held the knife close to her face, demanding that she hurry. When she lay down in the box, the defendant closed and latched the lid. The interior of the box is approximately the same width as, and about three inches longer than, Yolanda's body. Air holes had been drilled in the lid and ends of the box.

10. The defendant then drove the pickup rapidly through the orchard to an area between tree rows near the back of the house. He then opened the box lid and held the knife to Yolanda's face, demanding to know where her car keys were. He then shut the box again. He brought Yolanda's Ford car to the same vicinity, and apparently began to load belongings from the house into the vehicles. On about four more occasions, the defendant opened the plywood box to extract information from Yolanda, such as when Ralphy would be home, where certain property items and documents could be

found, and the address of the Blakely's oldest daughter, Becky. Throughout this process, the defendant appeared to grow increasingly agitated and mean. He pressed the knife blade to Yolanda's throat or nostrils to compel her compliance, telling her he had just sharpened the knife, that he could cut her right now, and that she'd bleed to death.

11. As night fell, Yolanda complained of being cold and the defendant placed a blanket in the plywood box over her. After she heard the school bus stop out on the road, Yolanda attempted to holler and bang her feet on the box to warn her son of the danger. As Ralphy, then age 13, walked up the dark driveway, the defendant emerged from between the apple trees. He said, "Your mother's in great danger. Come with me and don't cause any trouble." Ralphy saw the knife, and the defendant said that he was desperate, and would use the knife if he needed to.

12. The defendant led Ralphy behind the orchard shop and house to a space between the 4th and 5th tree rows, where he saw the defendant's pickup and his mother's car. He heard yelling and kicking from inside the pickup, and heard his mother cry out, "Ralphy, are you okay?" and "Don't hurt him, Howard!" The defendant opened the lift gate and Ralphy saw the wooden box, but it remained closed. The defendant advised Ralphy that they were leaving, and he was going with them. He began to direct Ralphy to prepare to depart.

13. The defendant permitted his son to use the bathroom inside the house, and Ralphy used the opportunity to attempt to locate a pistol in his mother's closet, but was unable to find it. Before departing the orchard property, the defendant told Ralphy that he had a loaded shotgun in the pickup and if Ralphy "tried anything," all the defendant had to do was turn it around toward the wooden box and pull the trigger.

14. The defendant directed Ralphy, age 13, to drive his mother's car, and defendant drove his pickup with Yolanda inside the wooden box. After driving approximately five miles, the two vehicles stopped at the Mar Don Resort store for gas, but it was closed. The defendant opened the pickup canopy lift gate and opened the lid of the wooden box "to give [Yolanda] some air." At that time, Ralphy first saw his mother, wrapped in a blanket, inside the box. He saw the duct tape wrapped around her face and head. The defendant repeated to Ralphy the warning that his mother's safety depended on his cooperation.

15. It was decided the party would drive to Ernie's Truck Stop on the outskirts of Moses Lake for gas (at Yolanda Blakely's suggestion. After driving another ten miles, defendant stopped again and opened the wooden box, just before entering Highway 17 about two miles south of Ernie's. Upon arriving at the truck stop, defendant drove his pickup far to the rear of the property, behind several parked trucks, and instructed Ralphy on the routine they would follow to fuel the vehicles and pay for the fuel. Defendant first pulled the pickup to the pumps and filled its tank; then Ralphy pulled the car to the pumps and fueled it. Defendant and Ralphy then entered the truck stop store.

16. As the defendant reached the cashier's counter, Ralphy suddenly moved to a second cashier and shouted, "Call 9-1-1! Help us! He kidnapped us! He has my mom in a box!" The defendant grabbed Ralphy by the arm and dragged him from the store. Ralphy tried to prevent his removal by clinging to the door jamb, but was dragged outside. There the scuffling continued, until some truck drivers hollered at the defendant to leave the boy alone. The defendant then released Ralphy and ran to the cab of the pickup.

17. Ralphy chased after the defendant and jumped on the rear bumper, attempting to open the box to free his mother. The defendant drove rapidly out of the truck stop lot, shaking Ralphy loose from the vehicle as it bumped over the gutter. Ralphy ran back into the store, where the clerk had reached the 9-1-1 operator, and he provided a description of the defendant and his pickup to the operator.

18. The defendant drove south on Highway 17. Because the lift gate was up, Yolanda was nauseated by the diesel fumes entering the wooden box. After about half an hour, the defendant stopped the pickup. Just before the stop, the lid of the wooden box became unlatched and Yolanda was able to sit up briefly. She realized they were near a cattle feed lot in the area of Warden.

19. The defendant was angry and agitated, shouting "Ralphy ruined everything!" Yolanda told the defendant she felt sick and needed to urinate. He helped her out of the box (where she had remained for approximately four hours) and, because her hands were taped, assisted in pulling down her pants so she could empty her bladder. His tone was urgent, demanding and angry. He instructed her that she could now ride in the cab as long as her wrists remained bound, and roughly removed the tape (along with some hair) from her head and face. In the cab, the defendant again displayed the knife to Yolanda, then laid it in her view on the dashboard ledge. He instructed her that, if they were stopped, she must tell the police that she was accompanying defendant of her own free will.

20. The defendant had piled food, water, business files and other items next to the passenger door, so Yolanda had to sit next to him in the cab. They eventually drove from Warden to Lind, on Highway 26 to Colfax, Highway 195 to Pullman and Lewiston, Idaho, Highway 12 to Orofino, Idaho,

Lolo, Montana and Missoula, Montana, and 1-90 to Three Forks, Montana.

21. At some point in Idaho, defendant removed the tape from Yolanda's wrists. The two discussed issues relating to their divorce. They shared a banana.

22. East of Orofino, one of the pickup's tires blew. The defendant responded angrily to the frustration and delay of changing the tire. He ordered Yolanda back into the wooden box, where she stayed for approximately 45 minutes while defendant changed the tire. Later, as they neared Lolo, the defendant stopped and ordered Yolanda back into the wooden box so that he could stop for gas. He drove a short distance to a gas station, filled the tank, and drove on for a while before stopping to let Yolanda out of the box. She spent about half an hour in the box on this occasion.

23. Exiting 1-90 at Three Forks, the defendant stopped at a farm and ordered Yolanda back into the wooden box. He then drove a short distance, used a pay phone, then drove rapidly along a road Yolanda recognized from its extreme dustiness and bumps, and from cattle guards over which the pickup traveled. The Blakely's Montana home is on this road nearby. Defendant finally stopped the pickup and, after a delay, opened the lift gate and wooden box. Yolanda emerged cramped, bruised, gasping for air, her legs "asleep." They were at the home of Mary Gillespie, whom Yolanda had not before met.

24. Yolanda was allowed to clean up in Ms. Gillespie's bathroom. When the defendant returned briefly to the pickup, Ms. Gillespie and Yolanda formulated a plan to contact the police. While at the home, the defendant telephoned his friend Ilse Barros, telling her that he had kidnapped Yolanda and Ralphy, that Ralphy had gotten away, and that the defendant was in trouble. He called

daughter Lorene, telling her to go to Moses Lake to find Ralphy and to call "the lawyers" to stop both the divorce and trust litigation. He told Lorene Yolanda was sleeping, but when Lorene heard Yolanda speaking in the background, the defendant allowed Yolanda to talk to Lorene, instructing her what to say. The defendant also called a stock broker in Billings, received some price quotations and gave the broker certain sell orders. The defendant discussed with Yolanda the trust litigation and sale of the Grant County orchard, which he insisted be done immediately. He instructed Mary Gillespie to retrieve from his father (who was staying nearby) a copy of the legal description of the Blakelys' Logan, Montana property-which had been titled in Yolanda's name-so that he could prepare a deed for Yolanda to sign. He sat at the kitchen table and began to do some typing when he looked outside and saw that the house was surrounded by police officers.

25. The defendant instructed Yolanda to go outside and tell the police she had come voluntarily. Yolanda walked out and told the police of the kidnapping. Ultimately, the defendant was taken into custody without incident.

26. At various times since 1972, the defendant has been assessed by mental health professionals. He has been diagnosed as suffering from schizophrenia, paranoid type, on several occasions. He has been diagnosed by others as being free of any such psychosis, but having a pervasive personality disorder. The most thorough evaluation of the defendant's mental status was accomplished at Eastern State Hospital during the pretrial course of this case.

27. Defendant has an (Axis II) Paranoid personality disorder with schizotypal traits and a Narcissistic personality disorder with antisocial traits. Because of the first disorder, the defendant tends to experience life through a pervasive distrust and suspiciousness of others, a conviction that others

are exploiting, harming or deceiving him, a doubt of the loyalty or trustworthiness of friends and associates, a reluctance to confide in others due to a fear that the disclosures will be maliciously used against him. He reads hidden or threatening meaning into innocuous or neutral events, perceives attacks on his character that are not apparent, and bears persistent grudges. These traits are not limited to times when the defendant is experiencing a mood disorder, that is, they constitute lifelong patterns not caused by a medical problem.

28. Because of the narcissistic personality disorder, the defendant tends to have a grandiose sense of his own importance and to exaggerate his own achievements and talents. He expects to be recognized as superior without commensurate achievements, and is pre-occupied with ideas of importance and ideal love. He feels "entitlement" and that he is "special." The defendant lacks empathy, is envious and believes others are envious of him, and tends toward arrogant, haughty behavior.

29. The defendant's personality disorders influence and direct, but do not cause, his behavior. Defendant is able to sufficiently perceive the impacts of his conduct on others to behave with deliberate cruelty.

30. The kidnapping of Yolanda Blakely by the defendant was a domestic violence offense.

31. The defendant's motivation to commit kidnapping was complex, contributed to by his mental condition and personality disorders, the pressures of the divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children. While he misguidedly intended to forcefully reunite his family, his attempt to do so was subservient to his desire to terminate lawsuits and modify title ownerships to his benefit.

32. The defendant's methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the court makes the following Conclusions of Law:

1. As described in RCW 9.94A.390(l)(e), the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired by his personality disorders, but not significantly so. Defendant's personality disorders did not significantly impair his capacity to act with deliberate cruelty.

2. Repeatedly and protractedly confining his victim in a coffin-like box manifested deliberate cruelty to the victim, as described in RCW 9.94A.390(2)(a).

3. As described in RCW 9.94A.390(2)(h), the current offense involved domestic violence, as defined in RCW 10.99.020, and occurred within sight and sound of the victim and defendant's minor child. The defendant's conduct manifested deliberate cruelty to, and intimidation of, the victim.

4. Considering the purposes of chapter 9.94A RCW, and in light of a standard range for kidnapping in the second degree of 13 to 17 months (enhanced to 49 to 53 months by

firearm enhancement), the foregoing findings of fact and conclusions of law constitute substantial and compelling reasons justifying an exceptional, aggravated sentence.

5. A sentence of 90 months incarceration is a just and deserved punishment for defendant's conduct.

DONE IN OPEN COURT this 13 day of Nov., 2000.

/s/ Evan E. Sperline
JUDGE

SUPERIOR COURT OF WASHINGTON
FOR GRANT COUNTY

STATE OF WASHINGTON,	)	
	)	No. 98-1-00610-5
Plaintiff,	)	
	)	JUDGMENT AND
vs.	)	SENTENCE (JS)
	)	
HOWARD RALPH BLAKELY,	)	[√] Prison
	)	
Defendant.	)	[ ] Clerk's action
SID# WA15275162; DOB 6-3-36	)	required, firearms
AGENCY: GCSO 98-GS12773	)	rights revoked 5.6

I. HEARING

1.1 A sentencing hearing was held present were:
Defendant: HOWARD RALPH BLAKELY
Defendant's Lawyer: Doug Phelps
(Deputy) Prosecuting Attorney: John Knodell

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on July 17, 2000 by Plea

COUNT	CRIME with RCW	CRIME DATE
1	KIDNAPPING IN THE SECOND DEGREE, DOMESTIC VIOLENCE, RCW 9A.40.030(1), 10.99.020 & RCW 9.94A.125 (CRIME CODE 00655)	October 26, 1998
2	ASSAULT IN THE SECOND DEGREE, DOMESTIC VIOLENCE, RCW 9A.36.021(1)(c) & 10.99.020 (CRIME CODE 01035)	October 26, 1998

as charged in the Information

[X] A special verdict finding for use of **firearm** was returned on Count(s) 1 RCW 9.94A.125.310.
[ ] A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) _ RCW 9.94A.125, .310
[ ] A special verdict/finding of **sexual motivation** was returned on Count(s) _ RCW 9.94A.127
[ ] A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) __ RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s). RCW 9.94A,-RC W 69.500.401(a), RCW 69.50.440.
[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.
[X] The crime charged in Counts 1 & 2 involves **domestic violence**.
[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):

CURRENT OFFENSES ENCOMPASSING
N/A

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

OTHER CURRENT OFFENSES USED IN CALCULATING OFFENDER SCORE
N/A

2.2 CRIMINAL HISTORY (RCW 9.94A.360):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J	TYPE OF CRIME
1	Grand Larceny Washes	Unk	Bozeman, MT	12-6-54	A	NV
2	Petty Larceny	Unk	Aurora, CO	11-8/63	A	Unk
3	Assault/ Contempt of Court	Unk	Littleton, CO	8/17/66	A	Unk
4	Larceny	Unk	Big Horn County, WY	5-5-69	A	NV
5	Kidnapping Washes	Unk	Powell, WY	5-14-69	A	V
6	False income tax return, conspiracy subscribe false income tax returns	Unk	Spokane, WA	6-3-87	A	Unk

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360.
[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):

PRIOR CONVICTIONS ENCOMPASSING
N/A

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

PRIOR CONVICTIONS COUNTED AS ENHANCEMENTS

2.3 SENTENCING DATA:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhance-ments)	Plus Enhance-ment*	Total Standard Range (including enhance-ments)	Maximum Term
1	2	V	13-17 mos.	F	49-53 mos.	10 years
2	2	IV	12+-14 mos.	N/A	12+-14 mos.	10 years

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in protected zone, (VH) Veh. Hom., See RCW 46.61.520, (JP) Juvenile Present

* * *

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1

3.2 [ ] The Court DISMISSES Counts N/A
[ ] The defendant is found NOT GUILTY of Counts N/A

IV. SENTENCE AND ORDER

IT IS ORDERED:

* * *

4.3 The defendant HOWARD RALPH BLAKELY shall not have contact with Yolanda Blakely (dob 2-20-56) and Ralphy H. Blakely (dob 01-01-85) name, DOB, including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence)

* * *

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:
(a) CONFINEMENT. RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

*90	months on Count	1		months on Count	
14	months on Count	2		months on Count	
	months on Count			months on Count	

* Exceptional sentence; Findings of Fact and Conclusions of Law are attached

Actual number of months of total confinement ordered is: __
(Add mandatory firearm and deadly weapon enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

_____

The sentence herein shall run consecutively with the sentence in cause number(s) _____
but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400.

Confinement shall commence immediately unless otherwise set forth here: _____

_____

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

_____

4.6 [√] COMMUNITY PLACEMENT is ordered as follows: Count 1 and 2 for 12 months; Count ___ for ___ months; Count ___ for ___ months.

* * *

[√] Defendant shall have no contact with: Any member of victim's immediate family.

* * *

[√] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [√] mental health [ ] anger management and fully comply with all recommended treatment.

* * *

DONE in Open Court and in the presence of the defendant this date: 11/13, 2000.

/s/ _____
EVAN E. SPERLINE, JUDGE

/s/	/s/	/s/
John Knodell	Doug Phelps	HOWARD RALPH BLAKELY,
WSBA #11284	WSBA #22920	Defendant
(Deputy)	Attorney for	
Prosecuting Attorney	Defendant	

Translator signature/Print name: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

SUPREME COURT OF WASHINGTON

State
v.
Howard R. Blakely

No. 72785-6
February 04, 2003

Appeal From: 19545-7-III, 111 Wash. App. 851,
47 P.3d 149

Petition for Review: Denied.

SUPERIOR COURT OF WASHINGTON

IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON,	)	
	)	No. 98-1-00610-5
Plaintiff,	)	
	)	
vs.	)	
	)	
HOWARD RALPH BLAKELY,	)	
	)	
Defendant.	)	
	)	

VERBATIM REPORT OF PROCEEDINGS

July 31, 2000

Before the Honorable Evan E. Sperline
Grant County Superior Court
Department 2

APPEARANCES:

FOR THE PLAINTIFF: JOHN KNODELL
Prosecuting Attorney

FOR THE DEFENDANT: DOUGLAS PHELPS
Phelps and Associates

CCR NO. CA-SE-*J-A26908

THE COURT: . . . Is there any reason that sentence should not now be imposed?

MR. PHELPS: Your Honor, if I could respond? And I haven't had an opportunity to cross-examine this witness. Some things that she said, I've never heard of before. And other things could be -- I think, could assist the Court by way of cross-examination of this witness. I haven't had that opportunity. Some of the things that she did say to the Court I think go to the heart of the defense that we would have presented, and I think Mr. Blakely's statement today, although it was somewhat rambling, might enlighten the Court if we could review it in a written form.

But Mr. Blakely and I think the Court has reviewed, probably, the psychological evaluations that we've submitted from the three doctors that we have.

THE COURT: I have.

MR. PHELPS: And also Dr. Cressy (phonetic). Did you get Dr. Cressy's (phonetic) statement?

THE COURT: Yes.

MR. PHELPS: And Dr. Fredricks? But oddly enough as it may seem, she stated this was an attempt by Mr. Blakely to reunite his family, and he didn't view this as a kidnapping or illegal act, but he viewed it as an honest attempt to renew his family, or somehow avoid the break-up of that particular family.

And the operation he alludes to is what he calls a stem cell transplant that he believes will help his mental state and fix his mental problem -- what he uses -- not his mental problems, but his thought process problems. And also that of a son, another son, who resides in Montana.

As she stated, your Honor -- as she stated in our interview, Mr. Blakely was very tired -- what she views as tired, indicates that he was falling asleep and at one point indicates he was driving on the wrong side of the road on the trip back there, and she indicated in our interview, she offered to help him drive, because she was concerned he might fall asleep. And additionally, your Honor, there were blankets placed in the back of the box at one point, and pillows, and I think the FBI or the Gallatin county sheriff's department would -- based upon our interview with the Gallatin county sheriff department and some other witnesses involved in this.

Your Honor, suffice it to say my client suffers from a long history of psychiatric problems. I think everyone will agree to that. The question is what type of psychiatric problems. An unfortunate incident occurred as a result of that, and we'd ask the Court to follow the recommendations that have been given as a -- I think it will show that my client has a history of paranoid schizophrenia, and was acting not under the understanding of what he was doing was indeed criminal, but was under the understanding that what he was doing was an attempt to reunite his family.

And again, it might be helpful to the Court if I had an opportunity to cross-examine this witness. I won't take up a lot of time, but the information that you have before you, from the psychiatric evaluations, I think would be helpful in evaluating this.

THE COURT: Mr. Knodell?

MR. KNODELL: Can I just respond to that? There is some interesting material in Dr. Bogmill's (phonetic) report on Mr. Blakely. Mr. Blakely was given an incomplete sentences test in which he expressed a great disgust with our

legal system here. But also indicated a real problem with women. Says he'd like to reconcile his family. Says he regretted that society had eliminated control of the father over the family and men are not what they used to be in society. Went on to say that women should take over responsibility of the home life, men are not what they used to be in today's society.

And Dr. Bogmill (phonetic) went on to say in some other testing, that the defendant was rigid, overvalues his own worth, overevaluates his own worth, tends to utilize repression and denial excessively and manifests little or no insight into his own motivations. Goes on to say he's someone that is depressed, resentful, angry, and hostile.

We all talk about spin these days, but our position I think is clear to the Court, especially in view of Dr. Cressy (phonetic) and Dr. Fredrickson, the conclusions they came to, the kind of illness Mr. Phelps is talking to, the kind of illness Mr. Blakely is suffering from is the kind of illness most men who abuse their women suffer from. Mr. Blakely believed -- and in our view this is not insanity, he felt he had the right as the man of the family to coerce or do whatever he wanted to the family to keep it together. That is not insanity.

If you look at the documents, there has been a long history of this type of behavior, we think it is criminal, and Mr. Blakely in a number of ways also indicated that he knew it was against the law.

THE COURT: There always has been, in this case, a great deal of dispute about such things as Mr. Blakely's mental condition at the time that these offenses occurred, Mr. Blakely's motivation for doing what he did, Mr. Blakely's competence to proceed with judicial proceedings, and the other questions regarding potential defenses, such as being invited or entrapped in some way.

Mr. Blakely focuses somewhat unwaveringly on what he refers to as deception, or the art of deception.

To the Court, most, if not all of those issues have been resolved, and they were resolved by way of a plea of guilty. With all due respect, Counsel invites the Court in some ways to proceed as though Mr. Blakely had prevailed on a defense of insanity, which he did not. He waived that defense by pleading guilty.

In many ways, the question of what Mr. Blakely's ultimate goal was is also irrelevant to the Court. Picture yourself as the victim of this crime, and tell me whether it matters to you whether the perpetrator's goal is to do you harm or to reunite his family.

Mr. Blakely pled guilty to assault in the second degree, which carries under the circumstances of this case a standard range sentence of twelve to fourteen months. Fourteen months is imposed as to Count 2.

As to Count 1, kidnapping in the second degree, the standard range is thirteen to seventeen months. Because of a firearm or weapon enhancement, the standard range becomes forty-nine to fifty-three months. The Court is satisfied that there are compelling reasons in this record for a sentence within the standard range to be too lenient. Primarily, I refer to two factors in RCW 9.94A, Section 390. The first of those is that the defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

Many, many cases have come before this Court, when a person has been abducted in a way that involves the use of force, or the threat of force, or the display or offered use of a weapon, but to accomplish his goal, even a goal that in some perverted way is seen as beneficial, by putting the victim in a wooden box and latching it shut, is deliberate cruelty. There

is no other way for thinking people to see it. It goes beyond all that would have been necessary to accomplish the criminal intent, and falls squarely within what this Court and I think any reasoning person would see as not only cruelty, but deliberate cruelty, inflicted upon the victim.

In addition, in that same statute, another aggravating circumstance is that the offense occurred within sight or sound -- excuse me. The factor is, the current offense involved domestic violence, and one or more of the following was present: And one of the following is, the offense occurred within sight or sound of the victim's or the offender's minor children, under the age of eighteen years.

Mr. Blakely not only forcibly kidnapped his estranged wife and did it in the deliberately cruel way that I indicated, but put his son in the position of frantically reporting that to anyone he could notify. To watching it happen. That circumstance must forever imprint and distort the way that this child will think of his parents. Both of his parents.

The sentence, even enhanced with a firearm or weapon enhancement to fifty-three months, is clearly too lenient, given this conduct. The Court is limited to the statutory maximum, which is ten years, or a hundred and twenty months. The Court has imposed ninety months on Count 1, to be served in the state prison. That is an exceptional sentence. Mr. Blakely has, by virtue of that fact, the right to appeal the Court's sentence. Twelve months of community placement is ordered.

The Court will require an appendix to the sentence that recites the basic facts of the crime, including the use of the wooden box and the presence of the minor victim, that that concludes that the aggravating circumstances set forth in Section 390, 1A,-- strike that -- 2A, and 2H, sub 2, are

present. This matter will need to be brought back before the Court for approval of the appendix justifying the exceptional sentence.

MR. KNODELL: Can I ask, what's the Court's schedule today? Or maybe I should ask Mr. Phelps. Would it be better to maybe note this on for next week?

MR. PHELPS: That would be fine.

MR. KNODELL: And I'll provide Mr. Phelps with a copy. I just have a couple of questions. So what we need to prepare is a Findings of Fact and Conclusions of Law, as we would --

THE COURT: That's correct.

MR. KNODELL: The other question is, is the Court finding that the two factors which you have enumerated, that the conduct, cruelty, and second, domestic violence in the -- in the sight or sound of minor children -- are each of them independent grounds for an exceptional sentence?

THE COURT: I have not reached that conclusion or considered whether independently they would be. I can only tell you that -- and I don't rule it out. I only tell you that in my mind, the combination of those factors justifies the exceptional sentence.

MR. KNODELL: It may have some relevance. And I'd just point this out. If the case goes up to appeal, the Court of Appeals may want to know, in reaching a decision whether remand is appropriate or not, in the event that one they don't find grounds for -- either one -- excuse me, one of them -- whether the surviving ground was independently, in the Court's mind, sufficient.

THE COURT: I can certainly say that the deliberate cruelty that I've indicated would justify the exceptional sentence on its own, and an exceptional sentence of the magnitude imposed by the Court. I think in regard to the domestic violence perpetrated in the presence of the minor child of these parties, that that factor in and of itself would justify an exceptional sentence. I can't say that I've reached a conclusion as to whether or not it would justify an exceptional sentence of the magnitude that I've set forth.

MR. KNODELL: Very well. I'll draft it up then.

THE COURT: We'll continue this to next Monday, the 7th of August, 9:00 a.m., for entry of the Findings and Conclusions, and entry of the Judgment and Sentence. That's all in this matter.

RELEVANT PROVISIONS OF THE REVISED CODE OF WASHINGTON

Chapter 9.94A
Sentencing Reform Act of 1981

9.94A.010. Purpose

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to add a new chapter to Title 9 RCW designed to:

(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

(2) Promote respect for the law by providing punishment which is just;

(3) Be commensurate with the punishment imposed on others committing similar offenses;

(4) Protect the public;

(5) Offer the offender an opportunity to improve him or herself; and

(6) Make frugal use of the State's resources.

* * *

9.94A.120. Sentences

When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (4), (5), (6), and (8) of this section, a court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the sentencing range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

(4) A persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death, notwithstanding the maximum sentence under any other law. An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section. In addition, all offenders subject to the provisions of this subsection shall not be eligible for community custody, earned early release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release as defined under RCW 9.94A.150 (1), (2), (3),

(5), (7), or (8), or any other form of authorized leave of absentce from the correctional facility while not in the direct custody of a corrections officer or officers during such minimum terms of total confinement except in the case of an offender in need of emergency medical treatment or for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree.

(5) In sentencing a first-time offender the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender perform any one or more of the following:

(a) Devote time to a specific employment or occupation;

(b) Undergo available outpatient treatment for up to two years, or inpatient treatment not to exceed the standard range of confinement for that offense;

(c) Pursue a prescribed, secular course of study or vocational training;

(d) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(e) Report as directed to the court and a community corrections officer; or

(f) Pay all court-ordered legal financial obligations as provided in RCW 9.94A.030 and/or perform community service work.

(6)(a) An offender is eligible for the special drug offender sentencing alternative if:

(i) The, offender is convicted of the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in Schedule I or II that is a narcotic drug or a felony that is, under chapter 9A.28 RCW or RCW 69.50.407, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes, and the violation does not involve a sentence enhancement under RCW 9.94A.310 (3) or (4);

(ii) The offender has no prior convictions for a felony in this state, another state, or the United States; and

(iii) The offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance.

(b) If the midpoint of the standard range is greater than one year and the sentencing judge determines that the offender is eligible for this option and that the offender and the community will benefit from the use of the special drug offender sentencing alternative, the judge may waive imposition of a sentence within the standard range and impose a sentence that must include a period of total confinement in a state facility for one-half of the midpoint of the standard range. During incarceration in the state facility, offenders sentenced under this subsection shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for

the offender. The treatment services shall be designed by the division of alcohol and substance abuse of the department of social and health services, in cooperation with the department of corrections. If the midpoint of the standard range is twenty-four months or less, no more than three months of the sentence may be served in a work release status. The court shall also impose one year of concurrent community custody and community supervision that must include appropriate outpatient substance abuse treatment, crime-related prohibitions including a condition not to use illegal controlled substances, and a requirement to submit to urinalysis or other testing to monitor that status. The court may require that the monitoring for controlled substances be conducted by the department or by a treatment alternatives to street crime program or a comparable court or agency-referred program. The offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring. In addition, the court shall impose three or more of the following conditions:

(i) Devote time to a specific employment or training;

(ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer before any change in the offender's address or employment;

(iii) Report as directed to a community corrections officer;

(iv) Pay all court-ordered legal financial obligations;

(v) Perform community service work;

(vi) Stay out of areas designated by the sentencing judge.

(c) If the offender violates any of the sentence conditions in (b) of this subsection, the department shall impose sanctions administratively, with notice to the prosecuting attorney and the sentencing court. Upon motion of the court or the prosecuting attorney, a violation hearing shall be held by the court. If the court finds that conditions have been willfully violated, the court may impose confinement consisting of up to the remaining one-half of the midpoint of the standard range. All total confinement served during the period of community custody shall be credited to the offender, regardless of whether the total confinement is served as a result of the original sentence, as a result of a sanction imposed by the department, or as a result of a violation found by the court. The term of community supervision shall be tolled by any period of time served in total confinement as a result of a violation found by the court.

(d) The department shall determine the rules for calculating the value of a day fine based on the offender's income and reasonable obligations which the offender has for the support of the offender and any dependents. These rules shall be developed in consultation with the administrator for the courts, the office of financial management, and the commission.

(7) If a sentence range has not been established for the defendant's crime, the court shall impose a determinate sentence which may include not more than one year of confinement, community service work, a term of community supervision not to exceed one year, and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement if the court finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(8) When an offender is convicted of a sex offense …

* * *

(14) Except as provided under 9.94A.140(1) and 9.94A.142(1), a court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

* * *

9.94A.125. Deadly weapon special verdict-Definition.

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

* * *

9.94A.310. Table 1 – Sentencing grid

Sentencing Grid

SERIOUSNESS LEVEL	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XVI	Life Sentence without Parole/Death Penalty									
XV	23y4m 240- 320	24y4m 250- 333	25y4m 261- 347	26y4m 271- 361	27y4m 281- 374	28y4m 291- 388	30y4m 312- 416	32y10m 338- 450	36y 370- 493	40y 411- 548
XIV	14y4m 123- 220	15y4m 134- 234	16y2m 144- 244	17y 154- 254	17y11m 165- 265	18y9m 175- 275	20y5m 195- 295	22y2m 216- 316	25y7m 257- 357	29y 298- 397
XIII	12y 123- 164	13y 134- 178	14y 144- 192	15y 154- 205	16y 165- 219	17y 175- 233	19y 195- 260	21y 216- 288	25y 257- 342	29y 298- 397
XII	9y 93- 123	9y11m 102- 136	10y9m 111- 147	11y8m 120- 160	12y6m 129- 171	13y5m 138- 184	15y9m 162- 216	17y3m 178- 236	20y3m 209- 277	23y3m 240- 318
XI	7y6m 78- 102	8y4m 86- 114	9y2m 95- 125	9y11m 102- 136	10y9m 111- 147	11y7m 120- 158	14y2m 146- 194	15y5m 159- 211	17y11m 185- 245	20y5m 210- 280
X	5y 51- 68	5y6m 57- 75	6y 62- 82	6y6m 67- 89	7y 72- 96	7y6m 77- 102	9y6m 98- 130	10y6m 108- 144	12y6m 129- 171	14y6m 149- 198
IX	3y 31- 41	3y6m 36- 48	4y 41- 54	4y6m 46- 61	5y 51- 68	5y6m 57- 75	7y6m 77- 102	8y6m 87- 116	10y6m 108- 144	12y6m 129- 171
VIII	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y 41- 54	4y6m 46- 61	6y6m 67- 89	7y6m 77- 102	8y6m 87- 116	10y6m 108- 144
VII	18m 15- 20	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y 41- 54	5y6m 57- 75	6y6m 67- 89	7y6m 77- 102	8y6m 87- 116
VI	13m 12+ 14	18m 15- 20	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y6m 46- 61	5y6m 57- 75	6y6m 67- 89	7y6m 77- 102
V	9m 6- 12	13m 12+ 14	15m 13- 17	18m 15- 20	2y2m 22- 29	3y2m 33- 43	4y 41- 54	5y 51- 68	6y 62- 82	7y 72- 96
IV	6m 3- 9	9m 6- 12	13m 12+ 14	15m 13- 17	18m 15- 20	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57	5y2m 53- 70	6y2m 63- 84
III	2m 1- 3	5m 3- 8	8m 4- 12	11m 9- 12	14m 12+ 16	20m 17- 22	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57	5y 51- 68
II	0-90 Days	4m 2- 6	6m 3- 9	8m 4- 12	13m 12+ 14	16m 14- 18	20m 17- 22	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57
I	0-60 Days	0-90 Days	3m 2- 5	4m 2- 6	5m 3- 8	8m 4- 12	13m 12+ 14	16m 14- 18	20m 17- 22	2y2m 22- 29

NOTE: Numbers in the first horizontal row of each seriousness category represent sentencing midpoints in years(y) and months(m). Numbers in the second and third rows represent presumptive sentencing ranges in months, or in days if so designated. 12+ equals one year and one day.

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* * *

9.94A.350. Offense seriousness level

The offense seriousness level is determined by the offense of conviction.

9.94A.360. Offender score

The offender score is measured on the horizontal axis of the sentencing grid. . . .

9.94A.370. Presumptive sentence

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the presumptive sentencing range (see RCW 9.94A.310, (Table 1)). The additional time for deadly weapon findings or for those offenses enumerated in RCW 9.94A.310(4) that were committed in a state correctional facility or county jail shall be added to the entire presumptive sentence range. The court may impose any sentence within the range that it deems appropriate. All presumptive sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range except upon stipulation or when specifically provided for in *RCW 9.94A.390(2) (c), (d), (f), and (g).

* * *

9.94A.390. Departures from the guidelines

If the sentencing court finds that an exceptional sentence outside the standard range should be imposed in accordance with RCW 9.94A.120(2), the sentence is subject to review only as provided for in RCW 9.94A.210(4).

The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(1) Mitigating Circumstances

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law, was significantly impaired (voluntary use of drugs or alcohol is excluded).

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.

(c) The current offense was a violent offense, and the: defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense, or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including

positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A. 127.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020 and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter as expressed in RCW 9.94A.010.

(k) The offense resulted in the pregnancy of a child victim of rape.

* * *

9.94A.420. Presumptive ranges that exceed the statutory maximum

If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence.

* * *

Chapter 9A.20

Classification of Crimes

9A.20.021. Maximum sentences for crimes committed July 1, 1984 and after

(1) Felony. No person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine.

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an

amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 91 RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

(4) This section applies to only those crimes committed on or after July 1, 1984.

* * *

Washington Criminal Code

Chapter 9A.40

9A.40.020 Kidnapping in the first degree

(1) A person is guilty of kidnapping in the first degree who intentionally abducts another person with intent:

(a) To hold him for ransom or reward, or as a shield or hostage; or

(b) To facilitate commission of any felony or flight thereafter; or

(c) To inflict bodily injury on him; or

(d) To inflict extreme mental distress on him or a third person; or

(e) To interfere with the performance of any governmental function.

(2) Kidnapping in the first degree is a class A felony.

9A.40.030. Kidnapping in the second degree

(1) A person is guilty of kidnapping in the second degree if he intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.

(2) In any prosecution for kidnapping in the second degree, it is a defense if established by a preponderance of the evidence that (a) the abduction does not include the use of or intent to use or threat to use deadly force, and (b) the actor is a relative of the person abducted, and (c) the actor's sole intent to assume custody of that person. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, any other crime.

(3) Kidnapping in the second degree is a class B felony.

* * *

Chapter 10.99

Domestic Violence – Official Response

10.99.010. Purpose-Intent. The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.

The legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabitating, or involved in a relationship.

* * *

10.99.020 Definitions. . . .

(3) "Domestic violence" includes but is not limited to any of the following crimes when committed by one member of a family or household against another:

(p) Kidnapping in the second degree (RCW 9A.40.020);

* * *

10.99.040 Duties of court – No-contact order.

(1) Because of the serious nature of domestic violence, the court in domestic violence actions:

(2)(a) Because of the likelihood of repeated violence directed at those who have been victims of domestic violence

in the past, when any person charged with or arrested for a crime involving domestic violence is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim. The jurisdiction authorizing the release shall determine whether that person should be prohibited from having any contact with the victim, the court authorizing release may issue, by telephone, a no-contact order prohibiting the person charged or arrested from having contact with the victim or from knowingly coming within, or knowingly remaining within, a specified distance of a location.

72785-6

SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

R. HOWARD BLAKELY, II,

Appellant

PETITION FOR REVIEW BY THE SUPREME

COURT OF THE STATE OF WASHINGTON

Douglas D. Phelps
Attorney for Appellant

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* * *

7. The State supreme court should grant review based on the courts decision in *State v. Blakely* where the court held: "that *Apprendi* does not apply to factual determinations that support reasons for exceptional sentences upward. *Gore* held that Washington's statutory scheme permits a judge to impose an exceptional sentence within the maximum range determined by the Legislature. *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (2001). Because the statutory and nonstatutory aggravating factors neither increase the maximum sentence nor define separate offenses calling for separate penalties, the *Apprendi* rule is not triggered. *Id.* at 313-314. Consequently, the facts supporting the exceptional sentence here did not have to be submitted to a jury or proved beyond a reasonable doubt. *Id.* at 315; *see also State v. Hopkins*, 109 Wn. App. 558, 569, 36 P.3d 1080 (2001)."

This position is contrary to the position of the court in *Apprendi* where the U.S. Supreme Court held that, "if the court found by a preponderance of the evidence, 'the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Apprendi v. New Jersey*, 530 U.S. 466, 490,120 S.Ct. 2348, 147 L. Ed. 2d 435 (2000). The *Apprendi* court further held that the increase in the statutory maximum penalty violated Apprendi's constitutional rights to due process and a jury trial because it "removed from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 490.